To be argued by:
Weeden A. Wetmore, Esq.
Estimated time: 30 minutes

#KA 18-01340

STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION – FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff/Respondent,

v.

THOMAS S. CLAYTON,

Defendant/Appellant.

Indictment No. 2015-0378

RESPONDENT'S BRIEF

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Dated: February 28, 2019

TABLE OF CONTENTS

Page

INDEX TO APPENDIX

THE PEOPLE ARE USING APPELLANT'S APPENDIX

APPELLANT'S/RESPONDENT'S APPENDIX:

Please note, the People have used Appellate Counsel's Appendix in reference in our Brief. Therefore, we will not be submitting an Appendix.

TABLE OF AUTHORITIES

Page

Court of Appeals:

Appellate Division Cases:

Federal Cases:

Statute and Law:

Misc.:

QUESTIONS PRESENTED

1. Was there sufficient proof for a jury to find beyond a reasonable doubt that defendant, Thomas Clayton, procured the commission of the killing of Kelley Clayton pursuant to an agreement with Michael Beard to kill Kelley Clayton for the receipt, or in the expectation of the receipt, of anything of pecuniary value from defendant, in violation of Penal Law § 125.27(1)(a)(vi)?

Court Below: Yes.

2. Was there sufficient proof for a jury to find beyond a reasonable doubt that defendant acted in concert with Michael Beard with intent to cause Kelley Clayton's death and so intentionally caused her death, in violation of Penal Law § 125.25(1) and pursuant to accomplice liability under Penal Law § 20.00?

Court Below: Yes.

3. Were there inadvertent delays in turning over discovery and Rosario materials that did not cause substantial prejudice to defendant?

Court Below: Yes.

4. Did the court properly use its discretion to admit, without a hearing, non-novel scientific evidence based on reliable methodologies accepted within the relevant scientific or technical community and previously admitted in New York courts?

Court Below: Yes.

5. Did the court properly deny defendants motion to set aside the verdict or to have a hearing, after correctly finding the defense expert's affidavit and report, which defense counsel acknowledge he would have presented at trial were not newly discovered evidence?

Court Below: Yes.

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction for the crimes of Murder in the First Degree and Murder in the Second Degree following a jury trial in Steuben County Court. On April 24, 2017, the Honorable Peter C. Bradstreet, Steuben County Court Judge sentenced defendant to a term of life imprisonment without parole for Murder in the First Degree, and 25 years to life for Murder in the Second Degree (A 5098-5099).

Defendant filed a Notice of Appeal on April 25, 2017 (A 2-4).

COUNTERSTATEMENT OF FACTS

During the early morning hours of September 29, 2015, defendant discovered his wife, Kelley Stage Clayton, bludgeoned to death in their home (A 1346). The indictment alleges that defendant committed the crime of Murder in the First Degree by hiring Michael Beard, and Murder in the Second Degree by acting in concert with Beard (A 6-7).

Prior to the murder, Beard was an employee of the defendant's at two prior businesses, Paul Davis and ServPro, both property damage restoration companies (A 1587, 2724-2725). Between 2012 and 2014, Beard worked for defendant as a laborer at Paul Davis (A 1586, 1663). Paul Davis first operated out of Horseheads, but then moved its operations to defendant's residence on Ginnan Road in Caton (A 1662, 1759). When the business operated out of defendant's residence, in addition to his Paul Davis labor, Beard worked for defendant on his home and property (A 1393). Defendant allowed Beard to fish in his pond, and ride four-wheelers on his property (A 1393, 1625-1626, 1764-1765). In late December of 2014, in response to another Paul Davis laborer alleging that Beard stole money while working, defendant fired Beard (A 1591–1592).

In early 2015, defendant began working with Brian Laing at ServPro, which had offices located at 200 Lattabrook Industrial Park Road in Horseheads (A 1595). Defendant worked at Servpro as production manager (A 2727–2728). Defendant contributed equipment and vehicles from his Paul Davis franchise to ServPro (A 2728). Defendant also brought some of his Paul Davis labor force to work for ServPro (A 2729, 1595–1598). Upon defendant's recommendation, Laing hired Beard as a laborer in May of 2015 (A 2767).

In the summer of 2015, Beard and his girlfriend, Holly Barrett,[1] moved into a two-bedroom apartment located at 1696 Grand Central Avenue in Elmira Heights, which was jointly owned by defendant and James Sheehan (A 1386–1387, 1295, 1298). The apartment was located at the corner of Grand Central Avenue and 8th Street in Elmira Heights (A 1665-1666). Rent for the two-bedroom apartment was $700 monthly, which Beard paid directly to defendant (A 1299–1300, 1386–1388). By the end of the summer, Beard

[1] By the time of trial Holly Barrett had married Michael Beard and therefore testified as Holly Beard (A 1385).

and Barrett had moved downstairs to a larger, four-bedroom apartment, with an increased rent of $1000 monthly (A 1299–1300, 1387–1388).

On September 17, 2015, after other ServPro employees accused Beard of stealing, drinking, and "making drug runs while on the clock," Laing fired Beard (A 1453–1457, 2103–2105, 2769–2770, 4596–4599). After the termination, Laing overheard defendant tell Beard that he would have to move out of the apartment (A 2214). Tammi Black, ServPro's office manager, recalled defendant advising Beard that they would have to discuss the rent as the latter was "not going to have money to pay it now" (A 4588-4589, 4604-4605).

Investigator Allison Regan, of the New York State Police Computer Crimes Unit, performed a data extraction from Beard's cellphone (A 3561-3562, 3578-3582, 3636-3637). The extraction revealed text messages, including the following exchange between Beard and a person identified as Adam, following Beard's termination on September 17, 2015:

> (6:46 pm) Adam: hey don't say nothing but you heard what happened?
> (6:48 pm) Beard: nutin to say, it's all good
> (6:48 pm) Beard: ain't mad with nobody (A 3603).

Two days after his termination, Beard met defendant and then texted his girlfriend at 8:35 p.m. stating "hey, just gave Tom the money, he said if we don't have four hundred by Friday, then we gotta move" (A 3751).

On Sunday afternoon, September 20, 2015, Beard and defendant exchanged the following text messages:

> (1:08 pm) Defendant: you home?
> (2:01 pm) Beard: almost done yard working, helping a friend
> (A 3605).

At 6:19 p.m., defendant placed a call to Beard (A 3605). Then they exchanged the following texts:

> (6:27 pm) Beard: hey, did you come by the house? Our babysitter Just texted me. I'm trying to get the rent money up. Should have it all by Wed. If not, we will be moving.
> (6:34 pm) Defendant: yes, I stopped. Call me.
> (6:35 pm) Beard: Ok, give me 10 minutes. (A 3605-3606).

At 6:54 p.m., Beard called defendant (A 3605).

The morning of September 21st at 8:49 a.m., defendant texted Beard "I had a water loss, let's make it 11:30." Beard texted back "okay" (A 3606-3607). Less than 30 seconds later, Beard texted Larry Johnson, another former ServPro laborer, and said, "yo, Tom wants to talk to me" (A 4257, 1662-1663).

The People produced Sy Ray of ZetX to visually map locations of defendant's and Beard's cellphones, and certain ServPro vehicles equipped with GPS systems. Ray was able to plot such locations by using analytical software to upload call detail records from cellphone providers; Google records providing location information in latitude and longitude coordinates; and Fleetmatics GPS records (A3202, 3206, 3967-3968, 3976-3986).

Therefore, he testified that at the time of the 8:50 a.m. message, Beard was at his apartment in Elmira Heights (A 4001-4003).

Defendant also texted his wife that morning asking, "are you still going to the gym" and then made plans to meet at Wegman's at 1:00 p.m. (A 3699-3670).

At 11:20 a.m., Beard's phone was not at his apartment, but was moving westerly (A 4005, 4006). By 11:42 a.m. the device was in the Caton area (A 4006). Meanwhile, defendant's phone was also moving that morning (A 4009, 4079-4080). "[A]t a time roughly between 11:57 and 12:02", both Beard's and defendant's phones were traveling in an area that was west of Elmira and extended to Lindley (A 4007-4008, 4080).

During the time the phones were traveling in the same area, defendant placed two telephone calls: one to Mathew Lunger of Anchor Glass at 11:58

a.m., and the second to Richard Phillips of McLaughlin Roofing at 12:14 p.m. (A 3239, 4403-4404). Defendant asked Lunger, if Anchor Glass was hiring, as "he had a friend that had just been fired from ServPro and he was looking for a job for him" (A 4404–4405). Defendant advised Phillips that he "had a guy that worked for him… He wondered if I had any employment for his guy" (A 2953–2954).

By 12:16 p.m., both phones had returned to Elmira (A 4009-4010). By 12:21 p.m., Beard's phone was back in the area of his apartment, when a text message was sent from his phone to defendant, stating "need a bike" (A 4010).

The next day, September 22, at 5:37 p.m., Barrett texted Beard "Tom is here" (A 3608, 4013). At 6:02 p.m., Barrett texted Beard "he said he be here at 8:30, 9:00 in the morning." Beard responded "okay" (A 3609). At 6:23 p.m., a call was placed to defendant from Larry Johnson's phone (A 3601-3602, 3836).

On Wednesday, September 23, Beard texted Larry Johnson at 9:04 a.m. "tell Kevin got morning appointments, I'll be ready after my interview" (A 3612). At 9:09 a.m., a call was placed from a ServPro alternative phone number to Beard, who was at home (A 3618, 4016). At 9:12 a.m., defendant texted James Sheehan, the co-owner of Beard's apartment, asking, "eviction

notice, where do we get one of those?" (A 3880). Phone records from Verizon reveal that defendant then placed a ninety-one second call at 9:15 a.m. to Lattabrook Mini Storage, a storage facility located adjacent to ServPro (A 1977–1980, 2643, 4016). John Holchuk, the owner of Lattabrook Storage, testified that he received a call about a week before the murder from someone identifying himself as 'Brian' from ServPro, advising that there had been a theft at ServPro, and that he wanted to know if any of Holchuk's security cameras showed his building (A 1976-1977, 2022-2023). Holchuk did not know if the caller was Brian Laing (A 2023). Holchuk advised the caller that one of his security cameras showed a portion of the back of the ServPro building, but not the doors (A 1373). The camera also would not record anyone walking in or out of the building (A 2023-2024).

At 9:19 a.m., Beard was still at his apartment (A 4013). Two minutes later his phone had moved north and was in the area of 11th Street and Horseheads Boulevard (A 4017). The device continued its way north traveling up Lake Road, and eventually arrived in the area of ServPro by 9:35 a.m., (A 4017-4018). A ServPro vehicle then powered on and moved along Industrial Park Road toward Lattabrook Road (A 4017-4018). The ServPro vehicle and Beard's phone were in close proximity at 9:35 a.m. Then they

separated at 9:37 a.m., with the ServPro vehicle moving north toward Pine Valley, while Beard's phone travelled south on Lake Road to the area of Grand Central Avenue and Cleveland Street in Elmira Heights (A 2897, 4018-4020). The trip from ServPro to the area past his house took Beard's phone approximately eight minutes to travel (A 4018-4020). Beard's phone then moved two blocks back north to his house arriving there by 9:47 a.m. (A 2396-2397, 4020). At 9:50 a.m., Beard sent a text message to defendant stating "need that eviction notice and a letter of release and a little bit please" (A 3612).

On February 6, 2017, Sergeant Brian Logsdon of the Steuben County Sheriff's Office rode a mountain bike from ServPro to defendant's home, using two possible routes (A 4330, 4333-4337). The first route took over ten minutes, and the second took over eleven minutes (A 4333-4337). Traveling by mountain bike to the area of Grand Central and Cleveland would have taken longer as that area was south of Beard's residence (A 2396-2397, 4019-4020).

After defendant and Beard went their separate ways at 9:37 a.m. on Wednesday, September 23, defendant eventually returned to ServPro by 11:53 a.m. (A 2746, 4081, 4082). He then left ServPro at 12:39 p.m. and travelled

to Beard's neighborhood in Elmira Heights, where he spent four to five minutes driving around (A 2750-2753). From Beard's neighborhood, defendant travelled home, and then drove to Cleveland, Ohio for job training (A 4022, 2735, 2807-2808). Although defendant owned a white Dodge Ram truck in September of 2015, he left it behind that day, as he drove a green ServPro Scion to Ohio instead (A 2730-2731).

In September of 2015, ServPro had the following vehicles: two Ford box trucks, two Toyota Scions, a Chevy 2500 pickup truck, two vans, defendant's white Dodge Ram, and Brian Laing's GMC pickup truck (A 2786-2788, 2730-2732). All of the vehicles with the exception of defendant's white Dodge Ram and Laing's GMC truck were equipped with Fleetmatics GPS tracking systems (A 2731-2732).

That Wednesday afternoon, Kevin Morris drove Beard from Elmira Heights to Wellsburg to work as a laborer for his new business (A 1600-1601, 4600).

In Wellsburg, Beard worked with Larry Johnson painting walls at Morris' shop until approximately 11:00 p.m. or midnight, at which time Johnson drove Beard back to Elmira Heights (A 1601-1602). At 12:28 a.m., Beard had Johnson pull over and park on either Cleveland or Garfield, which

was two or three streets away from Beard's apartment (A 1671-1672). Johnson recognized defendant's white truck parked in this area (A 1671-1672, 4023). Beard and Johnson got into defendant's truck, with Beard in the driver's seat, and Johnson riding as a passenger (A 1672-1673, 1678).

Beard powered off his cellphone at 12:38 a.m. and drove to the area of defendant's home in Caton (A 1674). Beard parked the truck on the road, got out, and then pulled a mountain bike from the back of the truck (A 1674). Beard rode away on the bike (A 1675-1676). Eventually Beard returned, and climbed back into the truck (A 1676). Beard and Johnson were still in the Caton/Lindley area at 1:42 a.m. (A 4023-4024). At 1:52 a.m., Beard was in the Elmira area when he sent defendant a text "[W]hen you can, call me" (A 4025). At 2:01 a.m., Beard and Johnson were back in the area where Johnson had parked his van and where he first observed defendant's white truck (A 1672, 1676, 4029, 4084). Beard finally returned to his residence at 2:05 a.m. (A 4030).

Later the same morning, the 24th, at 6:56 a.m., defendant called his wife (A 3793). Defendant then called Beard at 7:25 a.m. and 7:31 a.m. (A 3613, 3793). At 7:33 a.m., defendant called Larry Johnson's phone (A 3601-3602, 3793). This call and the earlier one made from Johnson's phone on September

22 were the only two calls ever made between defendant's and Johnson's phones (A 4032). At 7:40 a.m., defendant sent Beard a message "[I] spoke with James about the eviction notice, he should be able to get that for you today, call me when you have a minute" (A 3613, 3794). In response, Beard called defendant at 9:28 a.m. (A 3794).

Text messages continued between defendant and Beard throughout the day on September 24th discussing jobs for Beard (A 3717-3718). Beard complained bitterly when Morris failed to pay him for his labor (A 3764, 4898). At 8:15:28 p.m., Beard texted defendant "the boxes are being watched on the same street," to which defendant immediately responds at 8:15:47 p.m., "what?" (A 3616, 3758). After Beard texted at 8:16:48 p.m., "remember where I put the boxes on the street," defendant called Beard and spoke with him for over four minutes, followed up by another call at 9:01 p.m. that lasted over two minutes (A 3616, 3759).

At 8:12 p.m. that evening Beard was at home (A 4035). However, by 8:15 p.m., when Beard sent defendant the first text about "where I put the boxes on the street," Beard had moved to the same area where he had returned defendant's truck the night before with Larry Johnson (A 1672, 1676, 4033-4035).

At 9:24 p.m. a text message from defendant asked Beard "did you go to the roofers today?" to which Beard responded, "had no way, gonna ride bike tomorrow" (A 3619).

At trial, Holly Beard stated that when she and Beard resided at 1696 Grand Central Avenue, defendant stopped and placed a mountain bike in the garage for Beard (A 1398).

On Friday morning, September 25, 2015 at 8:04 a.m., defendant sent Beard a text, "James has the eviction notice, is dropping in your mailbox this a.m. what else do you need for DSS?" (A 3619). At 8:35 a.m., Beard texted back "a letter of release from the job" (A 3619, 3708). Defendant responded "okay, call Tammie in office and ask for one" (A 3619). On Friday afternoon, defendant drove from Cleveland, Ohio to the Seneca Allegany Casino in Salamanca, New York where he spent the night (A 2924, 2926, 4036).

Saturday, September 26 started with a text from Kelley to defendant at 8:18 a.m., asking "did you tell someone they could use the four-wheeler" (A 3808). Defendant answered that he gave Tetreault permission (A 3808). At 8:20 a.m., Kelley asked defendant "you in class?" to which defendant answered "yes" (A 3809).

At 10:18 a.m., defendant placed a call to Beard which lasted seventy-five (75) seconds (A 3237, 3810). Seventeen minutes later, at 10:35 a.m., defendant texted Tetreault to advise "you don't have to get the four-wheeler back to my house, I will get it from you Monday at work" (A 3810). Defendant then deleted that text message from his phone (A 3810).

At 10:37 a.m., defendant called Michelle Augustine of Finn Academy and asked if she had found a custodian for her school (A 2701-2702, 3810). Defendant recommended Michael Beard for the job (A 2703). Augustine said the position was filled and she was not interested in hiring Beard (A 2703). Defendant responded that Beard "was not a bad guy," but just someone who would spend his paycheck in a day or two (A 2703). He also said that Beard rented an apartment from him (A 2703). When asked why he was recommending Beard, defendant explained that Beard had worked for him, but was fired because he didn't have a driver's license (A 2703).

At 10:51 a.m., defendant called Mike Strobel, an employee at First Arena in Elmira, who announced games and sold advertising for the Elmira Jackals Hockey team (A 2708). Defendant asked if there were security cameras at the Lindenwald Haus (where the Elmira Jackals housed their players) (A 2713-2715). Defendant claimed there was an incident with one of his vehicles (A

2714, 2719). When Strobel answered that to his knowledge there were no security cameras, and then asked if defendant wanted him to find out for sure, defendant said "no, that's okay" (A 2714).

At 11:46 a.m., when defendant placed another call to Beard, the GPS data on his vehicle revealed that he was in the Painted Post area (A 3811, 4037). Meanwhile Beard's phone was still in the area of his apartment (A 4037).

By noon, defendant was entering Horseheads, while Beard was still at his apartment (A 4037-4028). At 12:09 p.m., Beard called defendant, and was then in the area of ServPro (A 4038-4039). By 12:13 p.m., both defendant and Beard were in the area of ServPro (A 4039-4040). Beard left ServPro at 12:20 p.m., and travelled south on Lake Road, eventually arriving in the same general area where Larry Johnson had observed defendant's white truck parked on September 24 (A 1673). Beard's trip from ServPro that Saturday afternoon took only seven minutes (A 4041). Beard's phone then moved to his apartment, two blocks away (A 4041).

On Sunday, September 27, defendant called Luke Tetreault and reiterated what he had texted Saturday about not needing the four-wheeler back (A 1773). Defendant also said that they would not unload the four-

wheeler at ServPro, but instead suggested they swap trucks so that defendant could drive home, unload the four-wheeler there, and then swap the trucks back at ServPro on Tuesday (A 1773).

On Monday, September 28, a Lattabrook Storage security camera captured Tetreault's red truck arriving at ServPro at 8:07 a.m. (A 1774-1775, 1999). The same camera filmed defendant's white truck arriving at 8:10 a.m. (A 1999-2000). Defendant and Tetreault switched keys (A 1776). Tetreault did not give defendant permission to loan his truck to Beard (A 1792).

At 9:42 a.m., that morning, Greg Miller texted, "poker is on for tonight, do I have any players" (A 1844, 3811-3812). Defendant responded immediately, "yes, I'm in" (A 3812).

The Fleetmatics GPS system in the ServPro vehicle defendant drove on September 28 showed him in the vicinity of his Ginnan residence at noon (A 4088). Eight minutes later, at 12:08 p.m. his ServPro vehicle was at 391½ Park Avenue in South Corning (A 4088-4089).

Roland Duell, a mechanic at M&M Auto, located at 391 Park Avenue, testified that defendant entered the service bay and asked if he could use one of their phones as his cellphone was not working properly (A 1913, 1915-1916). Duell directed defendant to a shop phone with the phone number 607-

962-5634 (A 1916-1917). After placing his call, defendant left M&M Auto (A 1917).

Rebecca White, of the Finger Lakes Technology Group, provided call detail records for the phone number 607-962-5634 (A 1931-1932). The records revealed that the 12:09 p.m. phone call placed by defendant from M&M Auto was to Michael Beard (A 1941). At the time of the call, Beard's phone was in Elmira Heights in the vicinity of the Lindenwald Haus (A 4089).

Tetreault left work midday, driving defendant's white truck, while his own truck remained parked at ServPro with the four-wheeler (A 1776-1777). Lattabrook security cameras recorded the white truck leaving shortly after noon, and the red truck with the four-wheeler, leaving at 3:09 p.m. (A 1776-1777, 2000-2003).

At 4:46 p.m. Holly Beard texted Michael Beard "we ain't got no money, bills due, no food in this house and you are bullshitting on the real, me and kids will be better off alone, just me and them" (A 3620). From 5:15 p.m. through 5:54 p.m. Beard's phone moved around his neighborhood (A 4042-4045).

At 5:55 p.m., Beard placed a seventy-seven second telephone call to defendant (A 4045). At about this time, both devices were in the area of Lake

Road and 14th Street (A 4045). A security camera at R.S. Parker Landscaping at 415 E. 14th Street then recorded a red Dodge four-door pickup truck at 6:01 p.m., traveling west to east on E. 14th Street (A 2306-2314, 2364-2370).

After the red Dodge truck drove past Parker Landscaping at 6:01 p.m., a Lattabrook Storage camera recorded Tetreault's red Dodge truck pulling into ServPro at 6:04:54 p.m. (A 2002-2003).

Investigator Christopher Wilkinson of the New York State Police recorded the amount of time it took to travel from Parker Landscaping to ServPro on Lattabrook Industrial Park Road, while operating at the posted speed limits (A 2379-2383). Investigator Wilkinson drove the route five times, and found that the average time was three minutes and forty-three seconds, with the fastest time being three minutes and fifteen seconds, and the slowest time over four minutes (A 2382-2383).

After the red Dodge truck arrived at ServPro at 6:04 p.m., Beard's cellphone manually powered off at 6:08 p.m., powered back on at 6:09 p.m., and then manually powered off again at 6:10 p.m. (A 3623-3624). Lattabrook security cameras recorded Tetreault's truck then leaving ServPro and going past the end of Lattabrook's driveway at 6:10:28 p.m. (A 2005-2007). The cameras then recorded a green ServPro truck leaving ServPro and going past

the same driveway only twenty-four seconds later at 6:10:52 p.m. (A 2007). According to Brian Laing, ServPro's key fob system for its vehicles identified defendant as the driver of the green ServPro pickup truck that evening (A 2720, 2727, 2733, 2757-2760).

The red Dodge truck was then recorded at 6:14 p.m. traveling east to west on E. 14th Street past Parker Landscaping (A 2370).

Meanwhile, Clayton drove the green ServPro pickup truck to Head Over Heels Gymnastics located at 914/916 Lackawanna Avenue, arriving there at 6:17 p.m. (A 2761, 2919). Kara Sheehan arrived at Head Over Heels Gymnastics before 7:00 p.m. to pick up her daughter and saw the defendant there (A 1951-1952). When the Sheehans and Claytons left the gym, Sheehan saw defendant walk to a green ServPro truck (A 1952-1953). Defendant left Head Over Heels Gymnastics at 7:02 p.m., and arrived home at approximately 7:25 p.m. (A 2763). At 7:37 p.m., defendant left home and drove to Corning, to play poker at Greg Miller's home, arriving at 7:51 p.m. (A 1190-1192, 2763).

There were five other poker players in addition to defendant and Greg Miller. (A 1845- 1846). One player, Nick Hojnoski, who sat to defendant's immediate right, testified that he and defendant used their cellphones during

the game (A 3105). Data extractions from defendant's phone revealed activity throughout the poker game, including texting (A 3812-3815). There was conversation between defendant and David Pierri, another player, about tree stands (A 3106-3107, 3121, 3137). Pierri asked defendant if he could help move tree stands the next day (A 3107, 2121-3122, 3137-3138). Defendant said he would help, but never said he would bring Beard, or anyone else (A 3122).

As of 9:47 p.m., defendant was still using his phone (A 3815). Miller testified that cellular service in his home, including in the basement, was very good, and that he kept cellphone chargers at his house for the players (A 1849-1850, 1855).

According to Linda Miller, during the game defendant came upstairs and asked if he could borrow her phone as he needed to call a worker because he said he had left his own phone out in his car (A 1894-1895). She loaned defendant her phone, and he left the kitchen to place his call (A 1894). Miller did not hear what was said during the call (A 1895).

The next morning, when Linda Miller attempted to retrieve the call detail from her phone, she found no record of defendant's call (A 1896-1897). However, AT&T phone logs revealed that her phone was used at 10:53 p.m.

to place two phone calls that she did not make (A 1900). One call was placed to 607-398-3890, a number which was stipulated by the parties as a telefax number for Arnot Ogden Medical Center (A 1900, 3303). The second call lasted twenty-five seconds and was placed to 607-398-8390, Michael Beard's phone number (A 1900, 3304). Miller did not recognize either number, nor did she place the calls (A 1900).

During the game, Nick Hojnoski stated he had no desire to play past midnight due to his work schedule the next morning (A 1848-1849). Greg Miller remembered defendant "wanting to play longer and wanting Nick to stay, and, for some unknown reason, Tom said that he would play until 5:00 in the morning if people wanted to, that he was free" (A 1848-1849). While defendant was playing poker, his wife was at home (A 3377-3378). She sent her last text message at 10:21 p.m. to her friend, Abbe Tipton (A 2980, 3140-3143).

Meanwhile, at 8:34 p.m., Beard turned his phone back on (A 3624).

Following defendant's call at 10:53 p.m. to Michael Beard, the latter moved north from his apartment (A 4050). By 11:00 p.m., Beard was at the intersection of Grand Central Avenue and 14th Street in the area of the Dandy

Mini Mart (A 4050). Beard remained in the area of the Dandy until 11:07 p.m. and then returned to his apartment by 11:09 p.m. (A 4051).

Jennifer Butler, an employee of the Dandy Mini Mart, recalled that Beard was in the area at such time (A 1458-1463). She was very familiar with him as he was a regular customer (A 1461). Butler recalled that when Beard left, he rode away on a mountain bike "headed south as if he was going home" (A 1462-1463).

At 11:24 p.m., Beard manually turned off his phone (A 3625). By 11:24 p.m., Beard's phone had moved south from his apartment to Elmira (A 4052). He manually turned it back on at 11:44:13 p.m., and then manually turned it off again at 11:44:53 p.m. (A 3625).

Mark Blandford had known Michael Beard for three and a half years, but only knew him by the nickname, "Kato" (A 1488-1489). In September of 2015, Blandford lived in a boarding house at 1411 Grand Central Avenue (A 1493). On Monday, September 28, Blandford began drinking in the morning and consumed "probably ten to twelve 24-ouncers" of beer that day (A 1565). Beard arrived at Blandford's residence that evening, after which Blandford climbed into a pickup truck with Beard, and they drove to a nearby Weston Quick Store on Lake Road in Elmira, where Blandford bought three more 24-

ounce beers (A 1498, 1499-1500). According to Blandford, they then drove down Clemens Center to Church Street, and then "out to 352 heading towards like Corning" (A 1501). Blandford consumed another 24-ounce beer (A 1501).

At some point, Beard parked on the side of a road with no streetlights (A 1502). He exited the vehicle, took something out of the back of the truck and left, while Blandford remained in the truck as a lookout (A 1502-1505, 1563-1564). After approximately fifteen minutes, Beard returned to the truck out of breath, sweating and holding what appeared to be a stick (A 1505). Beard started the truck and began driving back toward Elmira while holding the object outside the truck window (A 1505-1507).

On the way back to Elmira, they made two stops (A 1507). At the first stop, Beard got out on the driver's side, walked in front of the truck and tossed the sticklike object that he had been holding (A 1507, 1549). Beard drove a little farther and slowed down, whereupon Blandford threw from the truck a bag containing beer cans, a black t-shirt and gloves, all items Beard had placed therein (A 1508-1509). After returning to Elmira, Beard dropped Blandford off on the corner of Clemens Center Parkway and Thurston Street, a block from Blandford's home (A 1509-1510). Before getting out of the truck,

Blandford wiped down the inside of the truck where he had been sitting as well as the outside of the truck (A 1509-1510).

A Lattabrook Storage security camera recorded a truck returning to ServPro at 12:55 a.m. on September 29, after which the reflectors on a bicycle wheel were observed at 12:59 a.m. coming from the ServPro area and going past Lattabrook Storage (A 2008-2012). Beard's phone powered back on at 1:12 a.m. while in the vicinity of 11th Street and Horseheads Boulevard, not far from Parker Landscaping (A 4052-4053). By 1:14 a.m., Beard's phone was "at or near his residence" (A 4052-4054).

Investigator Christopher Wilkinson recorded the time it took to travel from ServPro on Lattabrook Industrial Park Road to defendant's residence at 2181 Ginnan Road in Caton (A 2392-2393). Wilkinson described a route from defendant's residence to ServPro took him on Route 225 to Elmira, eventually proceeding down Clemens Center Parkway to Grand Central Avenue, where he turned north and went past the Lindenwald Haus, and then past Beard's apartment (A 2393-2395). Wilkinson took a right on E. 14th Street and travelled the same route as he had taken when recording the time from Parker Landscaping to ServPro. It took thirty-two minutes for Wilkinson to travel from 2181 Ginnan Road to ServPro (A 2395-2396).

Wilkinson also recorded the time to travel from the intersection of E. 8th Street and McCauley Avenue, an area two blocks from Beard's apartment, to defendant's residence on Ginnan Road (A 2396). However, this trip included a stop at the Weston Quick Store on Lake Road, where Blandford said he and Beard had stopped to buy three 24-ounce cans of beer the night of the murder (A 1499-1500, 2396-2397). This trip took Wilkinson thirty-one minutes (A 2398).

Investigator Wilkinson travelled the distance a third time, starting from defendant's residence on Ginnan Road (A 2398-2399). He took a slightly different route but found the distance between ServPro and 2181 Ginnan Road to be the same as the first route he took, which was 17.5 miles (A 2399). The time to make the trip was also thirty-two minutes (A 2399).

According to the Fleetmatics GPS system, defendant's ServPro vehicle, and therefore defendant, remained in the vicinity of Greg Miller's home on September 29, 2015, until 12:22 a.m. when the ignition started (A 2763-2764, 4049). Defendant then drove home where he arrived at 12:35 a.m. (A 2764, 2818-2819).

At 12:38 a.m., defendant called 911 and initially exclaimed "Help me, help me, my wife, she's dead . . . ." After providing his address and some

information to the 911 operator, defendant failed to hang up the phone, and then after more than twenty seconds of silence, is heard asking Charlie his daughter, "Did you see Mommy? Did you? Did you see a robber? A robber?" (A 3926-3928).[2] Defendant then drove to the Almy residence at 2150 Ginnan Road arriving at 12:42 a.m. (A 1297, 2765).

Derek Almy was awakened and met defendant at the front door (A 1300-1301). Defendant entered the Almy residence and exclaimed, "We've been robbed. We were robbed" (A 1302). Defendant asked Almy's wife to watch his children, and said that Derek Almy needed to go with him (A 1301). Defendant and Almy then climbed into the ServPro truck and sped up the road to the Clayton residence (A 1301-1302, 1304).

Before entering the house, defendant stopped Almy and said, "I have to warn you, it's gruesome" (A 1305). Upon entering the kitchen, Almy saw Kelley Clayton lying on the floor and knew she was dead (A 1309-1310).

Almy testified that the "seriousness of the situation" became apparent to him and he started to look around the house wondering if anyone else was there (A 1310). Almy said that defendant knew he was a gun owner with

[2] The People refer this Court's attention to Peoples Exhibit 377, the 911 recording.

multiple firearms in his home, but never asked him to bring a gun back to the house (A 1318). Almy noticed that at the landing of the staircase there was blood on the wall above a hole in the sheetrock (A 1311-1313). Almy felt uncomfortable, and the realization that he "was in some place [he] shouldn't be" came over him (A 1310). When the police arrived shortly thereafter, Almy exited the home (A 1313-1314).

While Almy was in the house, and prior to the police arriving, defendant called Kelley Clayton's sister, Kim Bourgeois, to tell her Kelley was dead (A 1342). Subsequently Kim, her husband Corey Bourgeois, her daughter Molly Bourgeois, and Kim and Kelley's mother, Elizabeth Stage, travelled immediately to the Clayton residence (A 1361). Corey Bourgeois testified that after they arrived the defendant neither looked up nor did he respond to the family, even amid the hysterical reaction to Kelley's death by her mother and sister (A 1362-1363). Molly Bourgeois also testified that defendant never responded to them (A 3449-3450). When asked by police about possible suspects, Molly gave the names of Michael Beard and Tommy Epperson, two Servpro employees fired on September 17 (A 3451-3452).

Steuben County Investigator Donald Lewis asked defendant to accompany him in his police car to travel to the State Police Barracks in

Painted Post (A 3343). Once in the car, defendant blurted out "[w]ell, you'll know where I am because my vehicle has GPS in it" (A 3343). After they arrived at the barracks, police took defendant to an interview room as they wanted to question him as a witness (A 3344). Investigator Lewis and New York State Police Investigator Brian Kozemko conducted the interview (A 3345). At 3:34 a.m., Kozemko advised defendant of his Miranda rights because at that time they "didn't have any idea really what had occurred or who was a suspect, who wasn't a suspect" (A 3346). Police first asked defendant to recount a timeline of the day leading up to his discovery of Kelley (A 3346). In response, defendant said the following:

- He worked at ServPro then went home for lunch to drop off a four-wheeler that Luke Tetreault had borrowed from him the previous weekend (A 3347, 3377-3379).
- He drove the four-wheeler around a pond on his property and then back to his house and went back to work (A 3347).
- That evening, he took his daughter, Charlie, to gymnastics at Head Over Heels Gymnastics in Horseheads (A 3347).
- While at Head Over Heels, he played on his iPad.
- At some point, he left Head Over Heels for about fifteen minutes to look at a fire in Elmira.
- He returned to the gym to pick up his daughter and take her back home.
- At approximately 7:30 or 8:00 p.m. he went to Greg Miller's house in Corning to play poker.
- At approximately 12:22 a.m. he drove home, arriving at 12:35 a.m., when he found all the lights on in his house.

- Upon entering the house, and finding his wife deceased in the entrance near the laundry room, he called 911, and then took his children down the road to Almy's house where he left them, he then returned to his home with Derek Almy (A 3347-3348, 3371-3372).

When defendant gave his statement to Investigators Lewis and Kozemko, he claimed that his daughter said there had been a robber (A 3348). Defendant was asked if there were:

> any people around the bar where Kelley worked that might have been bothering her, if he had any enemies, if she had any enemies, if either of them had any significant others outside of their marriage, if . . . [defendant] had any disgruntled employees at work who were mad at him, anybody recently fired, any enemies, [or] anyone he could think that would be involved in this (A 3380).

Defendant "said he had no names, he could not mention one person" (A 3380).

The only suspicious activity that he could think of was from a year or so before, when one of the neighbors had mentioned a suspicious white panelled van in the area (A 3380). He also advised the investigator that his wife had purchased a security system through Time Warner Cable, but that he had no knowledge of how it worked or if it was ever on (A 3350).

During the interview, defendant further explained his whereabouts on the night of September 28, 2015, as he provided the investigators with the names of the other poker players at Miller's residence (A 3351). He showed

investigators his cellphone, and in particular, a text message he had sent his wife that evening while playing poker (A 3347-3348). Defendant said that there was a couple thousand dollars in the house, a safe under the bed upstairs, and a gun safe in the basement (A 3349).

Senior Investigator Kevin Sucher of the New York State Police outlined the investigation undertaken by the New York State Police Forensic Identification Unit (A 2168, 2169, 2294, 2299). At 7:45 a.m., his unit entered defendant's residence dressed in Tyvek suits (A 2173, 2174).

According to Sucher, the "bloodletting event" began in the master bedroom where the forensics unit found bloodstains on the bedding, curtains, hardwood floor and dresser (A 2222, 2178, 2179). Based on his observations, Sucher was of the opinion that Kelley Clayton was struck more than once while she was in bed (A 2191, 2223). The blood evidence at the end of the bed revealed that the victim had been "upright, walking, traveling, with blood dripping on the floor" (A 2192, 2223). In the upstairs hallway, there were pictures knocked off the wall, and there was blood on the master bedroom door at the top of the stairs, on the floor and on the walls (A 2181, 2223). The blood evidence suggested that the victim fled down the hallway to the door of the last bedroom, belonging to her daughter, Charlie (A 2182, 2223).

Investigator David Kuntz took a swab from just below the door handle on the door to Charlie Clayton's bedroom (A 1729).

Sucher opined that when Kelley Clayton went down the stairs, she either fell or a struggle occurred (A 2223).

Investigator Jason Fifield of the New York State Police Forensic Identification Unit also collected evidence from the Clayton residence (A 3455-3456). One of the items he collected was a large yellow fragment that had blood on it (A 3458-3459). Fifield also collected two fragments from the barstools in the kitchen (A 3909).

In light of the information that defendant had placed a call on Linda Miller's phone at 10:53 p.m. to Michael Beard, the New York State Police picked Beard up for questioning at approximately 2:00 p.m. on September 29, 2015 (A 2045). Beard was taken to the State Police barracks in Painted Post for questioning (A 2043-2045). There, Investigator Lambert obtained a consensual buccal swab from Beard (A 2049).

Additionally, Beard turned over his cellphone to Lambert for examination and analysis (A 2046-2047). Investigator Allison Regan examined Beard's Samsung cellphone on October 2, 2015, and discovered a lot of deleted activity and powering events that were of interest, as they

occurred during the time of the murder (A 3577-3578, 3582-3583). That discovery prompted her to call a case agent and recommend they speak with Beard again (A 3583).

On October 2, 2015, police found a yellow maul handle on State Route 225 and Kneale Road in the Town of Southport (A 4549). Investigator Sucher took a photograph of the handle found in the grass on the hillside, thirty-six feet from the road shoulder (A 2226-2227). According to Sucher, the handle appeared stained with blood (A 2878). New York State Police Forensic Scientist Ronald Stanbro later compared the large yellow fragment collected from the crime scene by Investigator Fifield, with the yellow maul handle recovered from Route 225, and determined that it was an exact match (A 3904-3912).

Additionally, Stanbro processed the eight items of debris from Kelley Clayton's body turned over to the State Police by the medical examiner, Dr. Nadia Granger (A 3910). Scientist Stanbro performed a chemical analysis of the two yellow kitchen fragments and the eight fragments from Kelley's body and the maul handle (A 3910). The two yellow fragments and the maul handle were all made of polypropylene (A 3911). He concluded that the yellow fragments could have originated from the maul handle or an object made of

the same material (A 3911). Scientist Stanbro also concluded that some of the debris from Kelley's body could have originated from the inner core of the yellow maul handle (A 3911).

Dr. Nadia Granger, Monroe County Medical Examiner, performed an autopsy of Kelley Clayton on September 30, 2015 (A 2545, 2548-2550, 2452). She found debris on Kelley Clayton's t-shirt consisting of white flakes, and red and yellow flecks (A 2553). She collected the debris and turned it over to police during her physical examination of Kelley Clayton. Dr. Granger observed that the victim had suffered significant damage to her face (A 2567). In that regard, Kelley Clayton's facial features were distorted as she had sustained numerous fractures to her facial bones, including her eye sockets, nose, and portions of her jaw (A 2556). In Dr. Granger's words: "the entire face . . . [was] actually sunken into the surface" (A 2556). The victim's teeth were damaged with some missing (A 2556). Dr. Granger also found tooth fragments in the soft tissue of Kelley Clayton's mouth area and recovered a tooth from the victim's hair (A 2556). The victim also suffered injuries to her back, right hip, and buttocks, as well as bruises and abrasions to her hands and arms (A 2557). Dr. Granger said the injuries to her right hip and buttocks were consistent with the damage observed to the drywall at the victim's home

(A 2569). Kelley's left thumb and middle finger were broken (A 2557). According to Dr. Granger, Kelley Clayton died as a result of blunt force injuries to the head (A 2567). Dr. Granger further opined that the maul handle was an object that could have been used to inflict the blunt force injuries found on Kelley Clayton (A 2569). Dr. Granger secured evidence using a sexual assault kit, and also secured a blood card from the victim (A 2563).

On October 14, 2015, Sergeant James Bailey of the New York State Police searched a creek in Elmira Heights (A 2339-2342). He found keys in the creek bed on the south side of E. 14th Street in the area of a bridge abutment (A 2341-2344). Defense counsel established that if a person were traveling on E. 14th Street in an easterly direction, the creek bed in which the keys were found would be on the right side of the road (A 2347-2348). When traveling easterly as such, Parker Landscaping would be on one side of the creek, Villa Serene would be on the other (A 2342-2344).[3]

One of the keys found by Sergeant Bailey had the letters "GAR" written on one side (A 2345). Investigator Fifield subsequently took the set of keys recovered by Sergeant Bailey to the Clayton residence on Ginnan Road (A

[3] See Exhibits 209 through 213 (A 2383-2387, 2388-2390, 2746-2753, 2760), for maps of the surrounding area.

3473-3475). He found the key with the "GAR" lettering opened the "man door"[4] to the garage, while the second key opened "the interior door from the garage going in the house" (A 3473-3475).

On October 14, 2015, Investigator Wilkinson "recovered some clothing that was in a . . . grey synch-type bag . . . in a swampy area" off Grand Central Avenue in Elmira Heights (A 2371-2372). The items were found on the easterly side of Grand Central Avenue just north of the Lindenwald Haus (A 2372). Investigator Jason Fifield examined the items recovered and identified them as, inter alia, soaking wet black jeans and a t-shirt, which were sent to the New York State Police Crime Laboratory for examination (A 3475-3476, 3480, 3482).

Leah Egnor, a forensic serologist with the New York State Police Forensic Investigation Center, examined various items of evidence submitted to the laboratory by the New York State Police and Steuben County Sheriff's Office in connection with the Clayton homicide (A 4341-4342, 4344-4345). Egnor was tasked with finding "blood evidence and also taking touch or ownership swabs from various items" (A 4345). The yellow maul handle

[4] This is the door for foot-traffic in and out of the garage.

tested positive for blood (A 4355-4357). The black t-shirt and black jeans recovered by Investigator Wilkinson tested positive for blood (A 4361-4363).

Egnor took ownership cuttings and swabs from the jeans and t-shirt (A 4361-4361). Various swabs from the crime scene also tested positive for blood, including a swab from the east bedroom door (A 4366- 4368). Egnor preserved all swabs and representative cuttings for DNA analysis (A 4357, 4359).

Amanda Brinton, also a forensic scientist with the New York State Police Crime Laboratory, performed DNA analysis of various items submitted to her for examination (A 4419-4421). The items included a buccal swab from Beard and a bloodstain card from Kelley Clayton (A 4424-4425). She extracted DNA from the known samples and developed profiles for both Michael Beard and Kelley Clayton (A 4425-4427). She then performed DNA extraction procedures on the other evidence samples, and developed their profiles, which she then compared to the known profiles of Michael Beard and Kelley Clayton (A 4427-4428). Brinton found that the profile from the maul handle swabs matched Kelley Clayton's DNA profile (A 4427-4428). Swabs taken from the various bloodstains throughout the house also yielded profiles also matched Kelley Clayton (A 4441). A swab taken from the

bloodstain on the east bedroom door also contained a profile that matched the Kelley Clayton's profile (A 4444). Brinton also obtained a Y-STR profile from that bedroom door (A 4441). She concluded that "[it] was a mixture profile consistent with Michael J. Beard admixed with at least one additional male donor, with Michael Beard being the major contributor" (A 4441-4442). The Y-STR profile is only developed for males (A 4431-4444). Brinton said that the Y-STR profile from the east bedroom door was unique to Michael Beard's male family line (A 4443-4444).

As for the swabs taken from the clothing recovered from the swamp, although they tested positive for blood, Brinton found them to be insufficient for DNA comparison purposes (A 4459-4460). However, with respect to the ownership cuttings Egnor had taken, Brinton found the profile from the t-shirt's collar matched Michael Beard's profile, and a partial profile from the right sleeve edge was also consistent with Beard's profile (A 4433-4435).

Elisa Tetreault testified that she returned home at 4:00 p.m. on the day of Kelley Clayton's death (A 2025-2020). She found her son, Luke, at home in the garage, very upset (A 2025-2026). She also observed defendant's white pickup truck in the driveway (2027-2028). The following day, upon learning that Luke's truck was at ServPro, she drove to the business in defendant's

white truck intent on returning home with her son's truck (A 2028). While she was en route, Laing called her to say they could not find the keys to Luke's truck (A 2028). By the time she arrived, the keys had been found in a lockbox outside Laing's office (A 2029, 2772). Elisa Tetreault returned defendant's truck and left with her son's vehicle (A 2029-2031).

Once inside the building, the lockbox, which was located in the main bay area outside his office, could be opened and closed at will as it was never locked (A 2785, 2852). To exit the main bay area, one could simply go out the motorized front bay door by pushing a button and either walking quickly or rolling under the door before it closed (A 2783-2784).

Laing said that after Tetreault's mother left, he entered defendant's truck and retrieved defendant's passport as well as a paper bag half filled with stacked money (A 2778-2781). Laing did not know the amount, but he testified that at defendant's arraignment, defendant advised him "I'll probably need the money that we had for the building" (A 2774). Moreover, defendant said to Laing something to the effect that "the money for the building is in the truck" (A 2777).

Laing and defendant had previously discussed purchasing a building and financing the purchase, either through a bank or by paying in cash (A

2776-2777). Defendant offered one hundred thousand dollars in cash for the purchase (A 2777).

Defendant, in his own words to Brian Donovan, provided a different reason for the money in the truck (A 3327-3328). Defendant said he always had money like that "for going to the casino" (A 3328). Further defendant said that "whenever he goes gambling, he takes money and his passport" (A 3329). Defendant also gave Donovan a different reason for why he used Linda Miller's phone the night of the poker party (A 3328). Brian Donovan was a mutual friend of the Clayton's, who was back in the Elmira area in mid-November of 2015 to do some hunting (A 3322-3325). After reaching out to defendant by text message, the two met at a restaurant in Batavia (A 3326). Defendant told Donovan "that he made a phone call from the card game to the person responsible for Kelley's death" because he always talked with Beard "many times a day, because he had work for him to do" (A 3327). When Donovan asked why defendant used someone else's phone, defendant answered that his own phone had died (A 3328).

Tammi Black, office manager of ServPro, recalled that in mid-August of 2015, Laing and defendant made an effort to use ServPro funds to pay eight-hundred-twenty-eight dollars to the South Carolina DMV for fines that Beard

owed (A 4554-4595, 4601-4602). The check was returned August 17, because the South Carolina DMV would not accept business checks (A 4594). Following Beard's termination on September 17, defendant advised Tammi Black that he still wanted to pay the outstanding fine with a personal check (A 4595). Tammi Black advised defendant "that's awfully nice of you considering that he's been fired" (A 4595). Black recalled clearly that this conversation happened after Beard's termination but before Kelley Clayton's murder (A 4602-4603).

Andrea Spirawk, Kelley Clayton's lifelong best friend, testified that she was unaware of any extramarital affairs on the part of defendant (A 2138, 2142). However, at Kelley Clayton's last birthday party in 2015, defendant confided in Spirawk that "he was not satisfied by Kelley sexually" (A 2143). He confided in Spirawk, "Andi, I've never cheated on my wife, but I don't know what I'm gonna do, I'm gonna lose it" (A 2144). Defendant said he was tired of hearing Kelley complain (A 2144). He also said, "I like to get fucked up on drugs and have sex, and you know Kelley" (A 2144). Spirawk knew defendant meant that such behavior was "not Kelley" (A 2144). Spirawk was upset at the conversation because she loved both Kelley and defendant, and thus suggested marriage counseling (A 2145). She tried to give defendant a

hug, and in response defendant attempted to kiss her twice on the lips (A 2146-2147). Spirawk broke away, and defendant said "hey, I just thought you were trying to make out with me" (A 2146, 2157-2158).

Abbe Tipton, the close friend of Kelley Clayton who was the last person to communicate with the victim by text message on September 28, spoke with defendant in February of 2016 (A 3143-3144). Tipton said:

> He basically told me that he would never do something like that, he loved her, but he spent so much money on her, he cared about her, "do you know how much money I spent on her," and talked about trips that he spent money on (A 3145).

When asked if he had ever cheated on Kelley, defendant said "no, never" (A 3162). Tipton asked defendant that if he didn't do it, "why would Mike Beard do it?" (A 3145). Defendant's response was that Beard wanted money and called him at 5:00 p.m. on September 28 asking for money (A 3145). In response, defendant told Beard that "he didn't have any money on him, that it was all at the house, he wasn't going to be home that night, he was coming home the next morning" (A 3145-3146).

In contrast to defendant's statements to Tipton that he loved his wife and never cheated on her, the People presented several witnesses who testified as to defendant's various affairs as well as demeaning statements he made

about his wife. First to testify in that regard was Patricia Stone, a customer service manager for State Farm (A 1423).

Stone testified that during the summer of 2014, defendant called his wife a "bitch" on occasion, and also complained that all she did was "bitch" (A 2077). During that same summer, defendant said he was going to divorce his wife (A 2077-2078). Later that summer, he said he could not divorce her because she would take everything (A 2078).

Stone also testified that she had a sexual relationship with defendant that began in February of 2014 (A 2079). On one occasion Stone engaged in sexual intercourse with defendant at her residence in Lawrenceville, Pennsylvania, when a second woman participated at the same time (A 2077-2080). Defendant also bragged to Stone that he slept with other women (A 2081).

A second woman, Nicole Dillon, who had also worked for State Farm, corroborated Stone's account of the threesome encounter (A 3423). In March or April of 2014, two months after the threesome event, defendant and Dillon went upstairs at the State Farm offices in Corning and had sex (A 3425-3426). Feeling guilty for her actions, Dillon asked defendant why he would cheat on his wife (A 3424). Defendant said, "she's a real fucking bitch" and "you don't

know what it's like when she take (sic) her top off and her tits fall to the floor" (A 3424). Dillon asked "why don't you leave her", to which he said "that there's no way he could leave her, that she would take everything, and that he wished someone would come and fucking take his wife" (A 3424-3425).

Next to testify about defendant's affairs was Elizabeth Woodard, who met defendant while she was working for Finger Lakes Premier Properties which hired ServPro to clean up one of their flooded properties (A 3435-3436). She testified she had several sexual encounters with defendant: at job sites; a casino; her apartment in Geneva, New York; in New York City; and at defendant's own home in the living room (A 3436-3438).

Woodard testified that just two weeks after Kelley Clayton's death, she and defendant had sex in her Geneva apartment (A 3436). The sexual encounter in New York City was in February 2016 after the murder (A 3437). Defendant also confided in Woodard, that he contemplated leaving his wife before his daughter Charlie was born, but when he found out that his wife was pregnant, he "opted to stay" (A 3439).

Molly Bourgeois, defendant's niece also testified as to his affairs (A 3442-3443). Defendant had conversations with Bourgeois starting in the summer of 2014 and continuing through the summer of 2015 regarding the

various women in his life other than Kelley Clayton (A 3445). In that regard, defendant confided that he had slept with multiple women since marrying Kelley (A 3445). He told Molly of a neighbor in North Carolina, of a woman named Cheryl Johnson, and of a nurse in Elmira with whom he had been sleeping with through the summer of 2015 (A 3446). On one occasion when Cheryl Johnson and her husband slept over at defendant's home, defendant and Johnson had sex in one of the bathrooms (A 3446).

Defendant also confided in Molly Bourgeois that he did not love or like his wife, that he would divorce her as the children got older, and that he did not want to be with her (A 3446). He complained that his wife was very lazy, such that when returning home, he would find the house dirty (A 3446). During the Christmas of 2014, defendant advised Bourgeois that "this was going to be the last Christmas with him around and us being together as a family" (A 3447).

Kevin Morris also provided another insight into the relationship between defendant and his wife. When discussing money that he supposedly kept in a safe in his home, defendant said "I would never let Kelley have access to that money. The only two people that have access to that safe are myself and my mother" (A 1648).

Patrice Stone provided another insight when she testified that at the end of 2014 and beginning of 2015, defendant wanted a quote on increasing his wife's life insurance from five hundred thousand dollars to one million dollars (A 2078-2079).

Paul J. (P.J.) Gingrich was a State Farm agent who handled the defendant's insurance needs through 2014 (A 2635-2636). In August 2014 Gingrich started working at his uncle's insurance's agency, the Gingrich Insurance Agency in Lebanon, Pennsylvania (A 2634-2635). In 2012 Gingrich wrote a five hundred thousand dollar life insurance policy for Kelley Clayton (A 2652-2653).

In September of 2014, defendant reached out to Gingrich advising that his State Farm insurance was up (A 2614). Defendant wanted to increase all life insurance policies, including doubling his wife's policy from five hundred thousand dollars to one million dollars (A 2642). The application for Kelley Clayton's policy listed erroneously that her annual income was five hundred thousand dollars (A 2657). Gingrich said the mistake was on his part (A 2657). In any event, the life insurance policy was approved in November of 2014 (A 2659).

Following Kelley Clayton's murder, defendant would appear at the ServPro office with his father and talk about cleaning up the mess left behind. He also displayed a photograph of the blood on the floor because he was upset that he could not get it out (A 2111-2112).

Richard Flood, an adjuster for Erie Insurance, which had issued the homeowner's policy on the Ginnan residence, testified that no claim of theft or property loss was ever filed regarding the events of September 29, 2015 (A 4406-4409, 4412). He specifically testified that there was no claim for any theft of money, jewelry, or a lock box (A 4412).

POINT I

THE VERDICT WAS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

A. The People adduced sufficient evidence at trial to support the jury's verdict finding defendant guilty of murder in the first and second degree.

1. Introduction

Kelley Clayton, defendant's wife, was discovered during the early morning hours of September 29, 2015, brutally murdered in her home in the Town of Caton, in Steuben County. At the time, defendant was a local businessman and lived with his wife and two young children. Although the family appeared to be normal, the evidence at trial unequivocally showed that defendant was unsatisfied with the marriage and frequently had other sexual partners. He also repeatedly expressed his desire to be free of the marriage, but claimed that he could not divorce Kelley for financial reasons. Further, defendant doubled his wife's life insurance policy to one million dollars.

Michael Beard was a local laborer who drank, used drugs, and was frequently fired. He lived with his girlfriend and young children in an apartment owned by defendant. The relationship between Beard and defendant seemed inexplicably close. Defendant collected rent from Beard;

tried to pay an outstanding fine for Beard; defended Beard against allegations of theft on the job; and, although Beard was fired at least twice from defendant's businesses, rehired Beard and recommended him to other employers.

In the days leading up to the murder, defendant and Beard frequently met and communicated. A mountain of evidence including traditional telephone and GPS records, security camera recordings, and digital intelligence, revealed the two communicating through text messages, telephone calls, and face-to-face meetings. During these critical days, defendant provided Beard with multiple forms of transportation for use in the crime, including defendant's own truck, the personal truck of an unwitting ServPro employee, and a mountain bike. From the facts established at trial, it was clear that Beard had committed the actual murder. It was also reasonable to infer that defendant had a motive for commissioning the killing. He had provided the means, motivation, opportunity, knowledge, and direction for Beard to commit the murder. By using Beard's need for money and/or employment, defendant exploited his intimate knowledge of Beard's life to hire him to commit the crime.

Defendant took significant measures to conceal his involvement in the crime, including premeditating alibis, intentionally using vehicles equipped with GPS tracking technology, using phones other than his own at critical times, deleting certain communications, and attempting to secure inconspicuous meeting locations. Shortly after discovering his wife brutally murdered in their home, defendant began claiming that the events were the result of a robbery, although there were no obvious signs of such a crime. When questioned by police, defendant never mentioned Beard as a suspect. Police uncovered significant inconsistencies in defendant's account over the course of the investigation into the murder (A 1895, 2774, 2777, 3105, 3327-3328, 3812, 3814).

2. Standard of Review

The standard on appeal for determining whether a conviction is supported by legally sufficient evidence "is the same for circumstantial and non-circumstantial cases—whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." People v. Grassi, 92 N.Y.2d 695, 697 (1999) rearg. denied, 94 N.Y.2d 900 (quoted in People v. Marvin, 162 A.D.3d 1744, 1745 [4th Dept., 2018]). "It is well

settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People." People v. Hines, 97 N.Y.2d 56, 62 [2001] rearg. denied, 97 N.Y.2d 678 [internal quotation marks omitted]; see generally People v. Bleakley, 69 N.Y.2d 490 [1987]); People v. Clark, 142 A.D.3d 1339, 1340 (4th Dept., 2016) lv. denied 28 N.Y.3d 1143.

Indeed, when reviewing a jury's finding, it is not an appellate court's duty "to determine whether it would have reached the same conclusion as the jury with respect to a proposed innocent explanation of the evidence. Rather the appellate court, viewing the evidence in the light most favorable to the People, must decide whether a jury could rationally have excluded innocent explanations of the evidence offered by the defendant and found each element of the crime proved beyond a reasonable doubt." People v. Reed, 22 N.Y.3d 530, 535 (2014) rearg. denied 23 N.Y.3d 1009. So long as the jury could have rationally drawn a guilty inference, the fact that other innocent inferences may be drawn from the evidence is irrelevant. People v. Rossey, 89 N.Y.2d 970 (1997). Measured by that standard, the proof in this

case was clearly sufficient. Although this was a purely circumstantial case, there were no major gaps in the proof and the jury's verdict rested on a sound factual foundation.

3. Murder in the First Degree

Murder in the First Degree, as charged to the jury, required the People to prove beyond a reasonable doubt that: (1) defendant caused the death of his wife by procuring the commission of her killing pursuant to an agreement with Michael Beard to commit the killing for or in expectation of receipt of something of pecuniary value; (2) that defendant did so with intent to cause the death of Kelley Clayton; and (3) that defendant was more than eighteen years old at the time of the crime (A 5001-5002). It was conceded that defendant was over eighteen years old and that Beard killed Kelley Clayton. The outstanding question was whether Beard had killed her pursuant to an agreement with defendant that the latter would provide Beard with something of pecuniary value in return.

Defendant claims that the case against him lacked any direct evidence that he sought, desired, intended, or agreed to the murder of his wife, or that he procured the commission of the killing pursuant to an agreement with Michael Beard to commit the murder. See Defendant's Brief at 21. Defendant

goes on to claim that there were, and remain, significant gaps in the inferences fairly drawn from the evidence. See Defendant's Brief at 21-22. Further, defendant claims that the jury's verdict, rather than resting on sound analysis and proof, was instead based on conjecture and explicit requests by the prosecution in summation that the jury speculate. See Defendant's Brief at 22. Ultimately, defendant concludes that his conviction must be set aside because the People failed to prove beyond a reasonable doubt that he procured, or was an accomplice to, the intentional murder of his wife, Kelley Clayton. See Defendant's Brief at 23.

The People disagree and submit that there was ample evidence that defendant and Beard jointly planned, prepared for, and committed the murder of Kelley Clayton, and that Beard agreed to participate in exchange for something of pecuniary value.

a. Defendant's close relationship with Michael Beard evidenced defendant's complicity in the murder.

The relationship between Michael Beard and defendant was very close. It began when Beard worked for defendant at the latter's Paul Davis franchise some years earlier (A 1590-1591). The company performed restoration work, and Beard was a general laborer (A 1590-1591). At one point while Beard

worked for defendant, the Paul Davis franchise operated from defendant's home, which allowed Beard to become familiar with the layout of the property and the house (A 1612, 1625, 1764-1765). In addition, Luke Tetreault, a co-worker of Beard's at Paul Davis, testified that defendant always gave Beard additional work when there was none available at Paul Davis, whether it was cleaning up defendant's property, cutting wood, mowing the lawn, or blowing leaves (A 1764, 1765). Likewise, when there was work to be done on the side, defendant gave it to Beard (A 1952, 1953). For instance, when his business partners remodeled their home, defendant suggested Beard for the job and, subsequently, the Sheehans hired Beard to do some of the demolition work. (A 1952, 1953).

In early 2015, defendant joined with Brian Laing to open a ServPro franchise (A 2723-2734, 2727-2728). Although defendant had previously fired Beard from Paul Davis for stealing, upon defendant's recommendation, Brian Laing hired Beard as a laborer at ServPro (A 1591-1592, 2728-2729). After all, Beard was a hard worker upon whom defendant could rely to perform even the dirtiest jobs (A 2767). Above all, the relationship was such that, when defendant called, Beard responded (A 1390). For instance, Holly Beard (née Barrett) testified that defendant called Beard during her daughter's

birthday party, and Beard left it to respond to defendant's needs (A 1391). Throughout their relationship leading up to the murder, Beard was only a phone call away for defendant.

During the course of their relationship, Beard was not only monetarily compensated, but also received personal benefits. For example, Holly Beard testified that she, Michael Beard, and their family had been at the defendant's residence fishing in the pond (A 1393). Kevin Morris testified that not only had Beard fished in defendant's pond, but he was also allowed to use defendant's four-wheeler (A 1610, 1626).

Moreover, the two worked together, and Beard also rented an apartment from defendant. In the beginning of the summer of 2015, Beard and Barrett rented a two-bedroom apartment at 1696 Grand Central Avenue in Elmira Heights for seven hundred dollars per month (A 1950). By the end of the summer, Beard and Barrett moved into a four-bedroom apartment, at the same address, paying one thousand dollars per month (A 1950). Although defendant had a business partner who usually collected the rent from tenants, defendant was the only person who collected the rent from Beard (A 1388, 1949, 1958)

Laing fired Beard on September 17, 2015, but defendant continued to stay in frequent contact with Beard in an effort to find him other employment (A 2953, 3239, 4182, 4404, 4405). Defendant also continued to seek rent payments after Beard's termination. Laing testified that he overheard defendant tell Beard that he would have to move (A 2864). Defendant then visited Beard at his apartment on at least two occasions, allegedly looking for the rent (A 3605-3606, 4013, 4015).

This relationship, while not incriminating by itself, was the foundation for defendant's procurement of Kelley Clayton's murder. Beard's termination was the event which afforded defendant an opportunity to exploit Beard's circumstances. It was Beard's reliance on defendant for housing, employment and future employment that made Beard a willing accomplice to commit the killing. Thus began the planning, preparation, and execution of Kelley Clayton's murder for defendant's personal benefit and for Beard's pecuniary gain.

b. <u>Defendant had motive to have Kelley Clayton killed.</u>

The jury was presented with the motive defendant had to hire Beard to kill his wife. In addition to the close relationship between defendant and Beard, and the various circumstances surrounding the planning and

preparation for the murder, the jury was presented with the motive defendant had to kill his wife. Although the prosecution does not need to prove motive, particularly in circumstantial evidence cases, "motive often becomes not only material, but controlling." People v. Mixon, 203 A.D.2d 909 (4th Dept., 1994) lv. denied 84 N.Y.2d 909 (1994); People v. Toland, 284 A.D.2d 798 (3rd Dept., 2001), lv. denied 96 N.Y.2d 942; People v. Fitzgerald, 156 N.Y. 253 (1898); compare People v. Carter, 158 A.D.3d 1105 (4th Dept., 2018) (In reversing the conviction as against the weight of the evidence, this Court noted that the People introduced no evidence of motive, and the Court "could not conceive of a possible motive" from its review of the record). Moreover, as the Court of Appeals stated in Harris:

> [t]he rule is well established that when a husband is charged with the murder of his wife it is competent to show his relations with a paramour. The reason for the rule is stated to be that such evidence tends to establish the absence of affection for the wife and a motive for getting rid of her People v. Harris, 209 N.Y. 70 (1913).

Here, there was proof at trial that defendant, who had multiple extramarital affairs, had lost affection for his wife. Several women testified about their intimate relationships with defendant, and his disparaging words about his wife.

Examples of extramarital affairs were disclosed by Patricia Stone and Nicole Dillon, who testified as to separate sexual encounters they had with defendant, as well a group sexual encounter (A 2079, 2082-2083, 3423, 3425-3426). Moreover, defendant told them that his wife was a "bitch," that all she did was "bitch," and that he wanted to divorce her but there was no way he could leave her, as she would take everything (A 2077-2078, 3424, 3425). Finally, defendant made disparaging remarks about his wife's appearance to Dillon (A 2924).

Next, the jury heard the testimony of Elizabeth Woodard who also had a sexual relationship with defendant (A 3436). Woodard said that she had numerous sexual encounters with defendant, some before the murder and some soon after the murder (A 3437, 3438). Defendant told Woodard that he thought about leaving his wife before his daughter was born, but once he found out she was pregnant, he stayed (A 3439).

To his niece, sixteen-year-old Molly Bourgeois, defendant confided that he was sleeping with multiple women throughout his marriage (A 1361, 3445). In addition, he made statements to Molly that he did not love his wife, let alone like her. Defendant said he was going to divorce her when the children got older. He said he did not want to be with his wife because she

was very lazy (A 3446). Further, defendant told Molly that he would come home and the house was not clean (A 3446). At Christmas in 2014, defendant told his niece that it was going to be the last Christmas he would be around, and the last time they would be together as a family for Christmas (A 3447).

Defendant denied having any extramarital affairs when confiding in Andrea Spirawk, Kelley's lifelong best friend. However, he told Spirawk that his wife no longer sexually satisfied him and that he did not know what he was going to do. When Spirawk tried to console him with a hug, defendant attempted twice to kiss her on the lips. When she rebuffed him, he blamed her saying he thought that Spirawk wanted "to make out" with him (A 2146). This interaction occurred on approximately August 1, 2015, two months before the murder.

The People submit that the numerous extramarital affairs, together with defendant's disparaging and at times crude remarks about his wife, clearly demonstrated that defendant had lost affection for his wife, and wanted out of the marriage without a financial loss.

There was also evidence that defendant had recently increased the life insurance policy on his wife to one million dollars. Although defendant

offered an innocent explanation for the increase, this action nevertheless gave insight into the broader picture (A 2651-2671).

c. Defendant provided the means and opportunity for Beard to kill Kelley Clayton.

Even after Beard was fired from ServPro, defendant continued a relationship and extensive communications with him. Phone records, which included: location information; GPS records; the content and timing of text messages; the times of telephone calls; and the telephone numbers used in making calls; as well as testimony from many witnesses; all provided a mosaic that, when considered together, provided the evidence from which the jury reasonably inferred that Beard and defendant had an agreement to kill Kelley. The evidence showed defendant's strong motive and clarified that the murder was the culmination of several days of preparation by defendant and Beard.

i. Defendant provided Beard with the means of transportation to commit the murder.

In the late evening hours of September 28, 2015, Michael Beard drove a maroon pick-up truck to the area of defendant's home in Caton, New York. With him was Mark Blandford, who testified that the two drank beers and drove to a road with no street lights. Blandford was to be the lookout. Beard then took something from the back of the truck and left. He returned about

fifteen minutes later, sweating and carrying a sticklike object at his side (A 1497-1510). He had just bludgeoned Kelley Clayton to death with it.

The Fleetmatics GPS records, the Parker Landscaping and Lattabrook Storage security videos, the cellphone data extractions, and the testimonies of Mark Blandford and Larry Johnson conclusively proved that defendant provided Beard with transportation, which constituted the means and instrumentalities for committing the crime. Viewing this evidence in the light most favorable to the People, as the court must on appeal, defendant provided Beard with a vehicle on two occasions: first, on September 23, and then again on September 28.

Defendant had access to his own white pickup truck and a green ServPro vehicle from his business. Then, two days before the murder, defendant's employee, Luke Tetreault, borrowed a four-wheeler. He picked it up from defendant's house in his maroon truck (A 1768-1771). When Tetreault drove his truck to ServPro on Monday morning, defendant suggested they simply swap trucks, and he (defendant) would take Tetreault's maroon truck, unload the four-wheeler, and return the truck to Tetreault on Tuesday (A 1773). Meanwhile, Tetreault would have defendant's white truck. Thus,

on Monday, September 28, defendant had the use of the maroon truck as well as a ServPro vehicle.

Around 6:00 p.m. on September 28, a number of events occurred, from which the only reasonable inference is that defendant gave Tetreault's truck to Beard. At 5:55 p.m., the records revealed a phone call from Beard to the defendant, after which the two were found to be in close proximity to each other in Elmira Heights. At 6:01 p.m., Tetreault's truck was recorded passing R.S. Parker Landscaping at 415 E. 14th Street, headed east toward Lake Road. At 6:04 p.m., Lattabrook Storage video recorded Tetreault's truck arriving at the ServPro parking lot. Phone records showed defendant's and Beard's phones were both in the area of ServPro at 6:08 p.m. At 6:10 p.m., the Lattabrook security video showed the same maroon truck pulling out of ServPro. Within seconds, a ServPro truck operated by defendant also pulled out from ServPro. Tetreault's truck then passed Parker Landscaping again but this time headed west at 6:14 p.m. By 6:17 p.m., defendant had driven in the green ServPro truck to Head Over Heels Gymnasium on Lackawanna Avenue (A 2763).

Defendant then drove home, arriving at 7:30 p.m. The evidence supports the reasonable inference that defendant picked up Beard in Elmira

Heights, drove him to ServPro, and then gave Beard the maroon truck, and took a ServPro truck for himself. Furthermore, after the murder, video surveillance at Lattabrook Storage recorded that Tetreault's truck returned to ServPro, after which a mountain bike left the ServPro parking area (A 2008-2009). The next morning, Brian Laing found the key to that truck in ServPro's key lockbox.

The security video at Lattabrook Storage recorded the mountain bike at approximately 1:00 a.m. on September 29, exiting the ServPro parking lot. A maroon truck is recorded returning minutes earlier to ServPro, at a time consistent with Beard having committed the murder in Caton and then having returned to Horseheads.

Defendant provided Beard with a mountain bike. Beard first asked defendant for a bike following his trip with defendant to the Caton area on September 21 (A 3608). Holly Beard testified that defendant delivered a mountain bike to their home at 1691 Grand Central Avenue (A 1398). Larry Johnson, who rode with Beard to the area of the Clayton residence during the early morning hours of September 24, saw Beard take a mountain bike out from the back of defendant's truck at that location (A 1674). Later that day, defendant texted Beard and, in response Beard said "gonna ride bike

tomorrow" (A 3619). Then, on September 29, shortly after 1:00 a.m., a bike leaves ServPro approximately four minutes after a Dodge truck pulls into the ServPro driveway with its headlights off (A 2008-2009).

From the facts and the reasonable inferences one can draw therefrom, the jury knew defendant gave Beard a mountain bike, and that the need for the bike was established during the planning of the murder. Ultimately, the jury knew, based upon such circumstantial evidence, that it was Beard, who, after murdering Kelley Clayton and returning Tetreault's vehicle to ServPro, rode past Lattabrook Storage on his way home. This above confluence of events led to the clear inference that defendant had given Beard a bike and a truck to facilitate the commission of the murder.

ii. Defendant facilitated Beard's access and provided critical logistical and other information necessary for Beard to commit the murder.

In addition to providing transportation, the evidence permitted an inference that defendant also supplied Beard with the means to commit the murder. No forced entry was found at defendant's home, thus raising the obvious inference that the killer had a means of access to the home (A 3350).

After the murder, the police recovered two keys to the Clayton home from a creek located on the route Beard took when returning home from

ServPro after dropping off Tetreault's truck at 1:00 a.m. on September 29. One key, labeled "GAR," opened the 'man door' to the attached garage, and the other key opened the door between the attached garage and the defendant's house proper (A 2345, 3474, 3475). In fact, if the murderer were only to have the single key from the shelf inside the garage, and the 'man door' to the garage was locked, force would have been required to enter (A 2580). It is highly unlikely that when planning for such a crime, entry would have been left to chance.

As proven at trial, a means of entry and modes of transportation were not the only items defendant provided Beard in furtherance of the murder. Beard would have to know that Kelley Clayton was home alone with the children and no husband. She was not at her sister's or mother's homes or elsewhere at the time of the murder. The only person with that information who would communicate with Beard was the defendant.

Another example of defendant providing Beard with information and access occurred on September 21, when he and Beard drove to either the area of defendant's house or the house itself. That morning, defendant texted Beard to set a meeting at 11:30 a.m. Beard immediately cancelled plans to work. Sometime that morning, defendant texted his wife, and made plans to

meet her in Corning for lunch after her gym class at noon, and thereby ensured that she would not be home until after 1:00 p.m. (A 909). Phone records plotted by Sy Ray showed that during that morning, Beard's phone had been at or near his home in Elmira until shortly before 11:30 a.m., when he moved to the west. By 11:42 a.m., Beard was in the Caton area near defendant's home. At 12:02 p.m., defendant's phone was hitting off the same tower as Beard's. At 12:14 p.m., defendant's phone made an outgoing phone call "within the same general area." Ray concluded that both phones started in Elmira, went west, and then returned to Elmira. At 12:21 p.m., Beard, having returned to the area of his house, texted defendant, "need a bike" (A 4001-4010). In the context of the other evidence, it was reasonable to infer that this was a meeting to discuss defendant's intent and instructions regarding the crime.

iii. Defendant directed Beard's actions and coordinated his movements.

Events during the week before the murder, considered as a whole, also led to the reasonable inference that Beard acted in coordination with, and at the direction of, defendant. Throughout this timeframe, there were numerous calls and texts between the two. In addition to the sheer volume of messages,

these communications frequently happened at times that were tellingly close to other events, indicating a probable connection.

One such example occurred on September 23. That morning, Beard received a call from an alternate ServPro number (607-873-7654) (A 4013, 4016). Within two minutes of receiving that call, Google Wi-Fi recorded him moving north to ServPro, where he arrived fourteen minutes later (A 4018). Meanwhile, at 9:15 a.m., cellphone records showed that defendant called Lattabrook Storage and asked about their surveillance cameras (A 2023, 4016). John Holchuk, the owner of Lattabrook Storage, testified that a week before the murder, he talked to someone who claimed to be Brian from ServPro about the camera angles (A 2023).

Once Beard arrived at ServPro, a ServPro vehicle engine started (A 4018). Within minutes, the cellphone records and Fleetmatics GPS records showed the ServPro vehicle and Beard's phone traveling in close proximity and then going their separate ways (A 4018). This time, it took Beard only eight minutes to arrive at Cleveland Avenue, an area farther away from ServPro than his own apartment (A 4020).

According to Sergeant Logsdon of the Steuben County Sheriff's Office, it took at least ten to eleven minutes for a physically fit person to ride a

mountain bike from Beard's house to ServPro (A 4336-4338). Based on the sergeant's testimony, as well as the sequence of communications and events that took place, it is reasonable to infer that defendant called Beard, who immediately rode the bike to ServPro, and then drove defendant's white truck to Beard's neighborhood.

It is also important to note that although Larry Johnson's involvement is temporally removed from this sequence of events, his testimony at trial was that he saw defendant's white truck during the early morning hours of September 24 parked a couple of blocks past Beard's apartment. Johnson then said they drove to the area of the Clayton home, where they parked in the road. The reasonable inference one can draw from these facts was that defendant loaned Beard his white Dodge Ram on the morning of September 23 after checking on whether they could be seen by surveillance cameras. Beard drove the truck from ServPro and parked it a few streets over from his apartment, where it remained until he and Johnson drove it to the area of the Clayton residence on the morning of the 24th.

On the afternoon of Wednesday, the 23rd, Beard sent a text message to defendant asking for an eviction notice, a letter of release, "and a little bit please." (A 3612). The ServPro vehicle, which was traveling in the opposite

direction, eventually returned to ServPro at 11:53 a.m. At 12:39 p.m., the defendant started the ServPro vehicle and travelled to Elmira Heights, where he stayed for several minutes. Laing testified that in reviewing the Fleetmatics GPS records, defendant was in Elmira Heights for five minutes before leaving for home (A 2922, 4010). Afterward, defendant travelled home then, at 1:43 p.m., drove to Cleveland, Ohio for training (A 4020, 4022).

Later that night, after working with Larry Johnson in Wellsburg until 11:30 p.m. or 12:00 a.m., Johnson and Beard returned to the area a few streets away from Beard's apartment where Johnson saw and recognized defendant's white truck parked on Beard's street (A 1671-1672, 1683). Johnson testified that Beard had the keys and the two used the white truck to drive to the area of defendant's home, where Beard took a bike out of the back and rode toward defendant's house. When they were initially riding in the truck together, Beard's phone was turned off, but at 1:42 a.m. it was turned back on. Phone records showed that Beard was in the Caton/Lindley area at the time (A 1673-1676, 1694, 4023). Ten minutes later, at 1:52 a.m., Beard and Johnson were in the Elmira area, and Beard texted defendant, "when you can call me" (A 4025). Beard and Johnson drove back to where defendant's truck had been parked. Johnson left in a van and Beard went home to his apartment.

After Beard sent his text message on the 24th, defendant first called his wife and then called Beard from Cleveland. He tried twice but made no connection with Beard's phone number, so he then called Larry Johnson's phone (which had been used to call defendant in the early hours of the 22nd). Later that day, Beard texted defendant regarding some "boxes" being watched on the street (A 4033-4034). In fact, Beard left his home to go to the same area where defendant's truck was parked the night before, and texted defendant the message that "The boxes are being watched on the same street." Then, in response to defendant's "what," Beard texted, "remember where I put the boxes on that street" (A 4033-4034). Immediately afterwards, there was a call from defendant to Beard, and the two spoke for more than four minutes (A 3758).

On Saturday, September 26, as defendant drove back from Salamanca (where he had stayed overnight on the way home from Cleveland), he and Beard had several phone conversations. As defendant neared Horseheads, Beard travelled from Elmira Heights. Therefore, shortly after noon, they were both in the area of ServPro (A 1836, 4035-4040). A few minutes later, both left that area. Beard travelled to the same area where defendant's white truck had been parked on Thursday, September 24, and then returned to the area of

his apartment. A reasonable inference from this evidence is that Beard met defendant at ServPro to return the white truck.

Finally, on the night of the murder, the 28th, defendant was at his Monday night poker game. At 10:53 p.m. Beard was home when defendant called him from the game (using his host's wife's phone and deleting that call) (A 1900). Within minutes, Beard was on the move, riding the mountain bike that defendant procured for him to the Dandy Mini Mart, which is located at the intersection of Grand Central Avenue and E. 14th Street in Elmira Heights. A clerk at the Dandy recognized Beard that evening and recalled that he was at the store for a few minutes before riding away on a mountain bike, headed south toward his apartment. She smelled no alcohol on Beard (A 1462-1463, 1465-1466). Beard returned home and left to pick up Blandford. They first went to the Weston Store to buy some beer. Beard and Blandford then drove to defendant's home on Ginnan Road. Beard turned off his phone at 11:24 p.m. (A 3625). The reasonable inference from this evidence is that defendant gave Beard the go signal; Beard went to the Mini Mart to establish an alibi, and then headed to the murder site.

At each instance, the evidence showed Beard responding to defendant's direction. Indeed, no other inference would have been reasonable.

d. <u>Defendant's unusual behavior before and after the murder implicated his direct involvement.</u>

Although no singular instance would be particularly troubling, when taken as a whole, and in conjunction with all the other events, defendant's behavior contributed to the reasonable conclusion that defendant was instrumental in planning his wife's murder.

In the days leading up to the murder, defendant was at times curiously very open and at others quite secretive. For example, of his many phone and text contacts with Beard, most were made from his own phone and, thus, easily traceable by law enforcement. However, several key contacts were either made from a different phone and/or were deleted. Most noteworthy was the 10:53 p.m. call made to Beard on the night of the murder from defendant's poker game – that call was made from the phone of the host's wife and then deleted. Defendant lied to obtain the host's wife's phone, telling her he had left his cellphone in the car. To the contrary, one of the players testified that defendant used his phone at the poker table, a fact verified by defendant's cellphone records (A 1895, 3105, 3812, 3814).

Another time defendant used a phone other than his own was on September 23 when he called Beard from an alternate ServPro telephone

number at 9:09 a.m., after which he called Lattabrook Storage at 9:15 a.m., inquiring about any security cameras with a view of ServPro, and while pretending to be Brian. Defendant gave Beard a truck at approximately 9:35 a.m. in the area of ServPro that day. (A 2897, 4017-4020).

A third time defendant used another phone was the call defendant made to Beard at 12:09 p.m. from a landline telephone at M&M Auto on September 28. Defendant placed that call after he had secured a truck from the unwitting Tetreault, which he would later provide to Beard. At the time of the 12:09 p.m. call, Beard was in the vicinity of the Lindenwald Haus, which by coincidence was the same business defendant had called on Saturday morning inquiring about security cameras, after speaking with Beard, and after texting Tetreault that he did not have to return his four-wheeler by Monday. (A 2713-2715, 3810). Although defendant claimed there was poor cellphone reception at the M&M Auto shop, Roland Duell, M&M Auto's head mechanic, testified that Verizon cellphone service worked "perfectly" (Verizon was the carrier for defendant's phone) (A 1917-1918, 3213, 3217). Moreover, defendant was only at M&M Auto long enough to enter the service bay, place the call, and leave. The Fleetmatics GPS records showed defendant at home at noon, at M&M Auto at 12:08 p.m., and then at State Farm Offices located at 341 Park

Avenue by 12:13 p.m. (A 4088-4089). In light of these facts, it was reasonable for the jury to infer that defendant was attempting to conceal his communications with Beard, who would drive a vehicle defendant provided to commit the murder.

At the times defendant made the aforementioned calls to Beard from phones other than his own, the credible evidence suggested that his own phone was working properly (A 1914-1917, 3618, 4016).

Defendant's text to Tetreault telling him he could keep the white truck until Monday was also suspect. Of the many messages and calls defendant sent that Saturday, that was the only message he deleted (A 4935).

Furthermore, defendant made several calls from his own phone to business contacts to recommend hiring Beard. (A 2057, 3239, 3754). This was suspious, as defendant had previously fired Beard for stealing while working for Paul Davis, and Laing had just recently fired Beard from ServPro.

Defendant also used his vehicles in ways that could be interpreted as purposely open or secretive. He used the ServPro vehicle with Fleetmatics GPS tracking capabilities at times when he would want to be tracked, such as driving it to the poker game on the night of the murder (A 1796-1797). He provided Beard with Tetreault's maroon pickup, which if it had been seen

would not have been readily associated with defendant. In that regard, defendant secured use of that truck by telling Tetreault not to unload the four-wheeler, even though it would have been easy and quick for him to do so on Monday morning at ServPro. (A 1773). Defendant also never mentioned to Tetreault that he was lending the truck to Beard (A 1792). As already stated above, when defendant loaned his own white truck to Beard, he only did so after first calling from an alternate ServPro line and then checking on possible surveillance cameras at Lattabrook Storage. (A 1373).

Beard's efforts to conceal his actions also provide evidence of defendant's guilt. For example, it is clear that Beard powered off his cellphone at critical times. Beard shut off his phone just before he and Larry Johnson drove up to defendant's house on September 24 (A 1674). Beard shut off his phone a second time on the 28th when he and defendant were together at ServPro shortly before he left with Tetreault's truck, with defendant following him in a green ServPro truck (A 3623-3624). Beard also shut off his phone during the time of the murder on the night of the 28th.

Investigator Regan testified that once she started looking at Beard's cellphone and noticed the powering events, she immediately called a case agent and advised that they should question Beard (A 3582, 3583). Clearly,

from these circumstances, the jury could have reasonably inferred that Beard shut his phone off at times he did not want his location known or later discovered. If Beard did not want his location known when defendant provided him with Tetreault's truck the evening before the murder, the implication was the exchange was not for any innocent purpose. Ultimately, the totality of the circumstances showed the defendant gave Beard the truck for only one reason—to provide a means of transportation so Beard could drive to Clayton's home and kill defendant's wife.

Even defendant's seemingly mundane communications with his wife, although not telling in and of themselves, provided defendant with key information about when she was or was not at home. On September 21, he called her to make a lunch date after her gym class, guaranteeing she would not be home when he and Beard drove there that afternoon (A 3020). Then, he texted her from his poker game shortly before the murder, ensuring she was home alone (A 3689).

The timing of the murder was also exactly coincident with his poker game, giving defendant a solid alibi. He made clear to the poker group that he was available to play as late as they wanted, even though some of the group

wanted to stop earlier (A 1849). He was actually one of the last two players to leave the game (A 1847).

When defendant went home shortly after midnight on September 29 and found his wife brutally bludgeoned to death on the kitchen floor, clad only in a t-shirt with her face all but obliterated by the attack and with blood spatters up and down the stairs, it is significant and telling that after he failed to hang up the phone upon completing his 911 call, defendant can be heard talking calmly to his daughter and asking if she saw a robber (A 3926-3928). It is also significant that defendant's first words to his neighbors after the attack were "We were robbed" (A 1302). Then he returned to his house with his neighbor, Derek Almy, who testified that he was horrified by the scene and worried about whether the killer might still be there, while defendant did not seem to have that concern (A 1313). Moreover, notwithstanding the violent nature of the crime, and the fact that they were returning to a house where the killer might still be hiding, defendant never asked Almy to bring a gun with him, although he knew that Almy had several (A 3384-3385).

When police arrived, defendant told them he was at a poker game and that his daughter said she had seen a robber. However, there were no apparent signs of a robbery. Defendant gave police a timeline of his movements on

September 28, but omitted any mention of giving Beard the maroon truck. When police asked if there were any disgruntled employees at work, defendant never mentioned Beard (A 3380). It was defendant's niece, Molly Bourgeois, who had the wherewithal to mention Beard as a potential suspect. Although he later told Abbe Tipton that Beard had called him at 5:00 p.m. asking for money, and he had told him it was all at the house and that he wouldn't be home until the next day, he never mentioned that fact to police either (A 3144-3145, 3351, 3386).

The day after the murder, defendant asked Laing to retrieve the money he had set aside for purchasing a building, which was in his white Dodge Ram. That amount was presumably one hundred thousand dollars (A 2774-2777). However, in November of 2015, defendant told another acquaintance, Brian Donovan, that the money was cash he always had in the truck for gambling at casinos (A 3328). Other witnesses testified that they would never carry that much money for gambling (A 1641-1623). Greg Miller, the host of the poker game, someone who had frequented casinos in the last ten years, testified that on occasion he has carried sums of cash in the amount of seventeen or eighteen thousand dollars, but that he doesn't like to carry that much because there is a chance of being robbed or of "somebody trying to do something to you" (A

1861-1863). Miller said he would never take a hundred thousand dollars to a poker tournament (A 1862). It was reasonable to be suspicious of defendant for having a sum that great in his vehicle without a clear explanation as to why.

e. <u>Defendant provided Beard with rewards of pecuniary value.</u>

The jury was charged that in order to convict defendant of Murder in the First Degree, in addition to finding that the People had proven that defendant procured the commission of his wife's murder, they also had to find that he procured that commission pursuant to an agreement with Beard to commit the killing for the receipt of or in the expectation of the receipt of anything of pecuniary value from defendant. The trial court defined "pecuniary" as "consisting of money or that which can be valued in money" (A 5001). The evidence described herein provided an ample basis on which the jury could have inferred that there was such an agreement, and that Beard expected defendant to recompense him for the murder. At trial, defendant moved for a trial order of dismissal twice, both times incorporating his claim that the evidence did not show there was an agreement with, expectation from, or payment to Beard. The court denied the motion both times (A 4519-4520, 4535, 4800-4802, 4813). On appeal, defendant renews these claims. Contrary

to his assertions, however, the proof presented at trial was sufficient to permit the jury to conclude beyond a reasonable doubt that defendant offered Beard payment in several forms, and that Beard killed Kelly Clayton in anticipation of said payment.

Tammi Black testified that after Beard was fired on September 17, 2015, defendant was still going to pay over eight hundred dollars with a personal check to the South Carolina DMV for Beard's outstanding fine (A 4595, 4602). In fact, Ms. Black testified she told defendant that it was nice of him considering that Beard had been fired (A 4602). It was especially curious in light of the fact that two days after his termination, Beard advised Holly Barrett that defendant just told him they had to have four hundred dollars or they would have to move.

Although the People submit that defendant intending to pay Beard's fine was sufficient for the jury to find the murder was contracted for something of pecuniary value, defendant gave Beard other items of monetary value. Specifically, we know the defendant gave Beard a mountain bike, an object which carries monetary value (A 1398). The mountain bike was the instrumentality to achieve the murder, but beyond this function, Beard and his wife used the mountain bike as a general means of transportation (A 1398).

In addition, we know that defendant called other businesses to find Beard a job, and that Beard was aware of at least some of these efforts. Especially in light of Beard's poor work record and his former contacts with the law, having someone like defendant vouch for his character and urge that he be hired would have carried a high value. Additionally, the fact that Beard still had not paid the rent as of Friday, the 25th, when he was scheduled to move out, but was still living there until at least September 29 reflects another pecuniary value bestowed upon Beard by defendant.

Finally, there was one hundred, thousand dollars in cash in defendant's truck after the murder. Defendant gave various reasons and excuses for why the money was there and not in his home (A 2774, 2777, 3329).

It was clear from the totality of facts and circumstances that defendant held out several pecuniary inducements and that Beard knew of them and committed murder in exchange for them. Beard also did not work for free. This was evidenced by the time Beard worked for Kevin Morris and complained when he was not paid (A 3764, 4898).

There is no requirement in the law that the payment actually be delivered. Rather, it is the expectation of receipt that is important. People v. Arroyo, 1998 WL 1806152, at 5 (Schoharie Cty. Ct., Sept. 29, 1998). Here,

the proven facts led to the reasonable inference that Beard expected to be recompensed for the murder. There was also no evidence to support defendant's suggestion that perhaps Beard was in a drug induced craze and was angry at defendant, there simply was no evidence of either.

Furthermore, defendant's suggestion that the lack of financial records to show a payment was critical, (Defendant's Brief at 33), is also not persuasive. There is no requirement that the payment be in funds visibly taken from a bank account. As the trial court noted in Arroyo, supra:

> Penal Law §125.27(1)(a)(vi) is very clear that murder in exchange for payment is prohibited and that the payment may be made prior to the murder, after the murder or may be merely expected to be made. The use of the word "agreement" in the statute does not mean that the entire body of civil contract law is brought to bear in the jury's deliberations. The general rule in construing a penal statute is that the words of the statute are to be given their usual, ordinary and commonly accepted meanings. McKinney's Statutes §271(c). "Agreement" is a word used in common parlance and capable of being understood by the layperson.

When considering the evidence as a whole and in the light most favorable to the People it supports the jury's finding that all elements of Murder in the First Degree were met beyond a reasonable doubt. As such, the verdict was supported by sufficient evidence. Rossey, supra.

4. Murder in the Second Degree

As instructed by the trial court, to find defendant guilty of Murder in the Second Degree, the jury was required to find that the People had proved beyond a reasonable doubt that defendant acted in concert with Beard to cause the death of Kelley Clayton and that defendant did so with the intent to cause the death (A 5003). Earlier in the charge, the court defined accessorial conduct, charging according to language of Penal Law § 20.00 that when

> one person engages in conduct which constitutes an offense another person is criminally liable for such conduct when acting with a state of mind required for the commission of that offense, he solicits, requests, commands, importunes or intentionally aids such person to engage in such conduct.

Intentional Murder in the Second Degree is essentially a lesser included offense of Murder in the First Degree. People v. Miller, 6 N.Y.3d 295, 301 (2006). Here, defendant was charged as a principal for Murder in the First Degree and an accessory for Murder in the Second Degree. The People's proof amply demonstrated that defendant intentionally aided Beard to commit the murder.

In the case at bar, in order to find defendant guilty of Murder in the Second Degree, the jury had to find that the People had proven that defendant had worked with Michael Beard to plan Beard's killing of Kelley Clayton and

had done so with the intent that she be killed. As discussed in section A(3) above, the evidence fits together to reveal defendant's strong motive to kill his wife. He supplied Beard with the opportunity and means to commit the murder, and he directed Beard and coordinated with him to carry the plot through to its conclusion. That evidence was amply sufficient to prove defendant guilty of Murder in the Second Degree.

Contrary to defendant's argument on appeal that there was no evidence that defendant had the intent to kill his wife, the proof of defendant's intent "flowed naturally from the evidence." People v. LaBruna, 66 A.D.2d 300, 303 (4th Dept., 1979). Even if the evidence that defendant shared Beard's intent was circumstantial, the test for legal sufficiency on appellate review is the same for both direct and circumstantial evidence. People v. Cabey, 85 N.Y.2d 417, 421 (1995). There is often no direct evidence of a defendant's mental state and the jury must infer intent from the surrounding circumstances and the defendant's actions. People v. Steinberg, 79 N.Y.2d 673, 682 (1992). Indeed, a defendant's intent is rarely proven "by an explicit expression or culpability by the perpetrator. People v. Barnes, 50 N.Y.2d 375, 381 (1980).

The necessary intent needed to support a finding of accessorial liability "may be established through the actions of the accused, based on the entire

series of events." People v. Carr-El, 287 A.D.2d 731, 733 (2nd Dept., 2001) aff. 29N.Y.2d 546 (intent can be "established from an act itself, or from the accessory's conduct and the surrounding circumstances"); People v. Platt, 278 A.D.2d 28, 28 (1st Dept., 2000) lv. denied 96 N.Y.2d 737 (accessorial liability may be established "by the totality of the evidence"). The issue of accessorial liability is "one of fact for the jury." Cabey, supra, at 421-22.

Here, the jury had ample basis to conclude that defendant acted in concert with Beard. The evidence taken as a whole unmistakably demonstrated that defendant and Beard operated with a common purpose and collective objective. Indeed, defendant devised and determined the common purpose.

Given all of the above, the proof supported the verdict and it should be affirmed.

B. The verdict was not against the weight of the evidence.

A weight of the evidence claim requires the reviewing court to first determine whether acquittal would not have been unreasonable, and if so, to weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions to determine whether the jury was justified in finding the defendant guilty beyond a

reasonable doubt. People v. Danielson, 9 N.Y.3d 342, 348 (2007); People v. Bleakley, 69 N.Y.2d 490, 495 (1987). Such a review in the case at bar supports a finding that the verdict was not against the weight of the evidence.

Defendant points only generally to conflicting testimony and inferences and relies on Carter, supra., in which this Court found "too many unanswered questions" and "weak circumstantial evidence," such that it could not affirm the conviction. The case at bar was different. Here, the People provided compelling evidence of defendant's motive for, opportunity for, and planning of his wife's murder. Defendant speculates that other explanations were possible but has not pointed out any discrepancies or material gaps which would warrant a finding that the verdict was against the weight of the evidence.

In this case, the People's evidence was not so unworthy of belief as to be incredible as a matter of law. This Court may set aside the verdict only if it appears that the jury failed to give the evidence the weight it should be accorded. See People v. Cahill, 2 N.Y.3d 14, 58 (2003) (quoting Bleakley, supra at 495). However, this Court must be careful in substituting its opinion for that of the jury, as great deference is accorded to the fact finder's opportunity to view the witnesses, hear the testimony and observe the

witnesses' demeanor while giving testimony. Bleakley, supra at 495; People v. Lesiuk, 81 N.Y.2d 485, 490 (1993); People v. Mateo, 2 N.Y.3d 383, 410 (2004) cert. denied 524 U.S. 946. The jury's verdict should not be disturbed unless it is clearly unsupported by the record. People v. Cummings, 291 A.D.2d 454, 455 (2nd Dept., 2002) lv. denied 98N.Y.2d 636. It cannot be said in the case at bar that the jury failed to give the evidence the weight it should have been accorded. People v. Reome, 64 A.D.3d 1201 (4th Dept., 2009), aff'd on other grounds, 15 N.Y.3d 188 (2010).

The defendant makes three arguments as to why the verdict was against the weight of the evidence. See Defendant's Brief at 40-46.

1. Defendant's argument that this was a robbery gone wrong is without merit and the jury properly dismissed this argument by weighing the evidence before them.

First, defendant claims that this crime was not a murder, but rather a robbery that did not go as planned. See Defendant's Brief at 40-41. His contention is that Beard, fueled with anger after having been fired and having him and his family evicted by the defendant, went to the defendant's unlocked or easily accessible home to steal money from the wealthy, money-flaunting defendant. See Defendant's Brief at 40-41. As support for this claim, the defendant noted that he told the police his daughter said there was a robber.

See Defendant's Brief at 40-41. In addition, defendant claims the police ignored evidence consistent with his innocence and failed to find, collect, and forensically test potential evidence. See Defendant's Brief at 41-42.

Initially, defense counsel's claim that Beard was angry with the defendant because of his firing and eviction is not supported by the evidence in this case. Specifically, on the night of his firing, Beard texted a friend, "ain't mad with nobody" (A 3603). Indeed, defendant, himself, was unaware of any animosity, as evidenced by his conversation with his neighbor, Derek Almy, who asked him after Beards' firing if he was worried because Beard knew where he lived (A 1321). In response the defendant said he was not worried and dismissed Almy's question (A 1320, 1322). Moreover, the sheer number of all of the contacts, whether by text messages, phone calls or meetings, between the two after Beards' firing does not support the conclusion that Beard was angry with defendant. Also considering the evidence that defendant gave Beard a bike, continued to want to pay his fines, and reached out to his associates looking for employment for Beard, it does not follow that there was any animosity between them (A 1398, 4595, 4602, 2902, 2703, 2954, 2956, 4404, 4405). In sum, such evidence refutes any suggestion that Beard would be angry with defendant. To the contrary, it suggests that he

would be appreciative of and indebted to defendant (A 4595, 4602, 2702, 2703, 2954, 2956, 4404, 3405).

Furthermore, defense counsel's suggestion that Beard, merely as a robber, entered the house through an unlocked door, or by using a key on the shelf in the garage, ignores the fact that keys to defendant's garage and house were found in a creek along the route where Beard likely travelled the night of the murder (A 2347-2348, 3473-3475). Those recovered keys ensured Beard's access to the Clayton home on the night of the murder even if the doors were locked. In light of those facts, it was reasonable to conclude that defendant had given Beard the house keys for the purpose of giving him such access.

Additionally, the People agree that defendant told the police his daughter said there was a robber, but the 911 call[5] reveals that it was defendant, in questioning his daughter, who first planted the notion of a robbery in her head (A 3348, 3372, 3384, 3926-3928, 4481). In fact, defendant not only told police it was a robbery, but those were the first words

[5] See People's Exhibit 377, the 911 Recording.

out of his mouth when he entered the Almy residence (A 3348, 3372, 3384, 4481).

Finally, defendant's claims that police failed to find, collect, and forensically test evidence is based upon mere speculation and conjecture about whether any evidence would have been found, and if so, what it would or could have shown. See Defendant's Brief at 41. However, as the Court of Appeals has explained, a weight of the evidence analysis requires this Court to weigh conflicting testimony, review any rational inferences that may be drawn from the evidence, and evaluate the strength of such conclusions. See Danielson, supra. Here, defense counsel boldly asserts, without pointing to any trial testimony or evidence from which to infer, that had the police examined the safe and the overturned table for forensic evidence, counsel could have established that Beard had attempted to steal money before Kelley Clayton was killed during an alleged burglary and attempted robbery. See Defendant's Brief at 41. Such a claim has no support and is belied by the record.

As to the forensic evidence on the safe in the basement, two experienced crime scene investigators, Senior Investigator Sucher and Investigator Fifield, testified that the Forensic Investigation Unit did not

process the basement for evidence because there was no indication that anything of evidentiary value would be found (A 2272, 3468). Yet, during the initial walk through of the murder scene, Investigator Armstrong took photographs and checked the safe for any trace evidence, finding none (A 3064). Subsequently, on September 30, 2015, Investigator Fifield, after getting the combination to the safe from defense counsel, opened the safe (A 3468). Investigator Fifield only found papers and some foreign coins in the safe (A 3468). Thus, from the evidence at trial, the only inference to be drawn was that no robbery had taken place or was ever attempted. In fact, the only significant amount of money found in this entire case came from the defendant's own truck, i.e. one hundred, thousand dollars (A 1477-1478). Lest we forget, defendant told Kevin Morris, "I would never let Kelley have access to that money. The only two people that have access to that safe are myself and my mother" (A 1648). Additionally, Investigator Fifield testified that there were no signs of a forced entry into the safe (A 3530).

Next, as to the knocked-over table in the basement stairway, and appellate counsel's claim that had the police examined it for evidence, they could have found evidence that Beard had attempted to steal money from Kelley during the burglary and attempted robbery, and killed Kelley Clayton,

again, appellate counsel's assertion is nothing more than mere conjecture and speculation. See Defendant's Brief at 41. The pink table was a children's table and the fact it was overturned on the stairway to the basement was clearly not unusual knowing the Claytons had two young children (A 3468). Investigator Fifield saw no items of evidentiary value in the basement. There were no blood splatters on those stairs, no traces of blood evidence, and no markings on the floor or wall of evidentiary value (A 3468-3469).

Finally, defense counsel claimed that had the police retrieved the partially-eaten food that had been discarded from Tetreault's truck and conducted forensic testing on it, they could have confirmed the theory that the truck was used in the murder. See Defendant's Brief at 41. For this claim, the People direct the Court again to the Danielson case, and note that defense counsel's claim is once more merely conjecture and speculation. Even if this were an appropriate claim by defense counsel, the People note that the evidence at trial showed that the half-eaten food was thrown away by Tetreault's mother at a gas station two days before the police were ever notified (A 2031, 2037). Consequently, the chances that the half-eaten food could have been found in the gas station two days later is doubtful. Further, the chances that anything of evidentiary value would have been found on the

food after it mixed with other garbage was doubtful, and the jury surely could have made that rationalization. In sum, the weight of the credible evidence at trial established that the half-eaten food could not have been recovered. Even if it could have, there was no reason to believe anything of evidentiary value would have been discovered.

Defense counsel then makes a second claim regarding Tetreault's truck. This time, defense counsel claims that since the police found no trace or latent evidence, such as fingerprints in Tetreault's truck, failed to match any tire tracks from the scene to Tetreault's truck, and Tetreault's truck did not match the description given by Mark Blandford, who rode up to the Claytons' with Beard, then there was nothing to connect Tetreault's truck to the murder. See Defendant's Brief at 41-42. Initially, it must be noted that Tetreault's truck was not examined for evidence until October 2, 2015, which could have caused evidence such as fingerprints to be lost or damaged (A 1808). Tetreault had been driving the truck since he got it back on September 30, 2015 (A 1808). In addition, Mark Blandford testified that when he got out of the truck after they returned to Elmira, he wiped off the interior and exterior of the passenger side of the truck. It certainly was not unreasonable to believe that Beard would also have wiped down his side of the truck. Based upon

these facts and circumstances, it was not unreasonable for the jury to rationally infer that any potential trace or latent evidence linking Tetreault's truck to Beard, if any existed, may have been destroyed.

In any event, the absence of any blood evidence in the Tetreault truck did not mean the person driving the vehicle could not have attacked Kelley Clayton (A 2488-2491). As Investigator Michael Lostracco, of the New York State Police Forensic Identification Unit, and whose forensic training included substantial instruction in blood splatter evidence, testified, the absence of blood in a vehicle would not allow him to draw an inference that someone committed a crime or did not, and then used that vehicle (A 2488-2489). As Lostracco explained, blood does not always transfer because it will dry or adhere to the surface it is on (A 2490). He advised that if an individual had dried blood on their front, the blood would not transfer to the seat of the car unless there was "some volume [of blood] still wet" and the person laid on the seat (A 2491).

Moreover, even though no DNA evidence was found in Tetreault's truck, Beard shutting off his cellphone at the time of the truck exchange at 6:08 p.m. was evidence before the jury. In fact, Beard shut off his cellphone at several crucial times throughout this case: during the dry run up to

Clayton's house with Larry Johnson, during the truck exchange, and at the time of the murder (A 1674, 3623-3624). Moreover, from other evidence in this case, we know the defendant had previously given Beard his own white truck to use as part of the plan to murder Kelley Clayton (A 2396-2397, 4019-4020). Furthermore, it was also significant that Elise Tetreault, when she picked up Tetreault's truck from ServPro after the murder, noticed the seat pushed way back, farther than when Tetreault pushed the seat back (A 2030). Holly Barrett testified that Beard was over six feet tall (A 1411). Therefore, someone tall had last driven the truck and the jury heard that Beard was over six feet tall.

The defense concedes in their brief that Beard committed the murder. The credible proof clearly revealed that the defendant provided Beard with Tetreault's truck at 6:10 p.m. (A 2002-2003, 2005-2007, 2306-2314, 2364-2370, 2733, 2758-2760, 3623-3624, 4045). The proof established that, after Beard received the 10:53 p.m. phone call, he did not immediately leave for the Clayton residence, but instead rode his mountain bike to the area of the Dandy Mini Mart and then returned to his apartment by 11:09 p.m. (A 1458-1463, 4050-4051). Sometime thereafter he picked up Mark Blandford and they drove to a Weston store and purchased beer (A 1498-1500). By 11:24

p.m., they were still in the Elmira area (A 4052). Beard powered off his phone at 11:44 p.m., and they drove to the Clayton neighborhood on Ginnan Road where Beard parked the truck, left Blandford behind as a lookout, and then killed Kelley Clayton (A 3625, 1501-1502, 1505-1507, 1549, 1563-1564). After he returned to the truck, they left for Elmira, but along the way, Beard stopped to discard the murder weapon (A 1507, 1549). Tetreault's truck returned to ServPro and entered the parking lot with the headlights off at 12:55 a.m. (A 2008-2012). At 12:59 a.m., a bike left ServPro and a few minutes later, Beard's phone powered on at 1:12 a.m. (A 2008-2012). At the time he was in the area of 11th Street and Horseheads Boulevard, not far from Parker Landscaping (A4052-4053). At 1:14 a.m., Beard was home (A 4052-4054).

Investigator Wilkinson took thirty-one minutes to travel from an area near Beard's residence to the Weston Store and then to the Clayton residence. A 2396-2398). He took thirty-two minutes to drive from Clayton's residence to ServPro, a distance of 17.5 miles (A 2395-2396, 2398-2399). It took Sergeant Logsdon, 10-11 minutes to ride a bike from ServPro to Beard's apartment (A 4333-4337).

Knowing that Beard committed the murder, it is clear from the above facts that he must have driven Tetreault's truck to Clayton's residence,

returned the truck to ServPro after killing Kelley Clayton, and then ridden a bike home. Such facts are not simply coincidental, but instead, clear circumstantial evidence that Beard drove Tetreault's truck that night. The proof of the truck exchange at 6:08 p.m. at ServPro was also strong circumstantial evidence establishing that defendant furnished Beard with the truck.

Defendant's failure to even mention the truck exchange or his interactions with Beard when providing a timeline of his activities the day before the murder evinced his consciousness of guilt about such actions with Beard on the 28th (A 3346-3348, 3380). The rational inferences from these facts are that Tetreault's truck was used in the homicide, notwithstanding the absence of any physical evidence, including blood trace evidence in the vehicle. Further, the only rational inferences point to defendant's guilt, not his innocence.

2. Defendant's argument that there was no agreement between defendant and Beard lacks evidentiary support.

Second, defendant claims that the People failed to prove by the weight of the credible evidence that there was any agreement between the two for Beard to kill Kelley Clayton and that defendant procured the killing by giving

or creating an expectation that he would give anything of value to Beard for the murder. See Defendant's Brief at 42. The People rely on the arguments set forth in Point I(a)(3) above, to refute defendant's claims of no credible evidence of agreement between defendant and Beard to kill Kelley Clayton and that defendant procured the killing through a pecuniary benefit or a promise of a benefit to Beard.

Here, defendant claims that all of the text messages and calls from Beard to him and ServPro, were made because Beard was anxious about "being evicted without money to live elsewhere." See Defendant's Brief at 43-44. Again, the People rely on the rationale and reasoning set forth in Point I(a)(3) above, which absolutely belies this contention that the conversation between Beard and defendant was only about being evicted and having nowhere to live without money. Defendant also argues that the evidence his mother was planning to be at his house, the night of September 28th, undermines the People's theory that defendant planned the murder that night. See Defendant's Brief at 44. Overall, defendant claims that it was "absurd" for anyone to believe that defendant, having evicted Beard and his family, would then hire him to kill Kelley Clayton in exchange for some job leads, a

used bike and an expectation of old fines being paid. See Defendant's Brief at 43.

Here, defense counsel made note of the lack of blood on defendant on the night of the murder, his solid alibi, and his mother coming to town, as evidence that defendant was neither the murderer nor that he planned the murder. First, the People agree, the defendant did not actually bludgeon Kelley Clayton to death, as evidenced by the lack of blood on him and his solid alibi. As conceded by defense counsel several times in his brief, and as supported by the scientific evidence, Beard bludgeoned Kelley Clayton to death. See Defendant's Brief at 5, 21, 40. However, we disagree that the fact defendant's mother was scheduled to be at his home disproves defendant's planning of the murder.

Defendant's mother, Phyllis Clayton, testified at trial. In fact, Mrs. Clayton claimed to have fallen asleep on the afternoon of September 28, 2015, and decided not to travel to the defendant's home (A 4763). However, Mrs. Clayton's tale is brought into question by her own testimony. Phyllis Clayton testified that although she decided not to travel that day, and even though defendant and Kelley Clayton were allegedly expecting her, she never called them to tell them she was not coming (A 4763-4764). It was also evident at

trial that from the content of the text messages between Kelley Clayton and Abbe Tipton that night, Kelley Clayton was not expecting her mother-in-law the next day either (A 4764). It is worth noting that at the time of trial, the jury had an opportunity to view Mrs. Clayton, hear her testimony, and observe her demeanor. See Bleakley, supra. Here, the jury must have chosen not to believe Phyllis Clayton's testimony that she was planning to be at the defendant's house on the night of the murder, but failed to tell her son or daughter-in-law that she was not coming.

3. There was overwhelming proof of defendant's motive to kill his wife.

Third, defendant claims the People failed to provide any evidence of that defendant had a motive to kill. See Defendant's Brief at 44. As support for this claim, defendant argues that the increase in the value of the life insurance policy on his wife was done upon the suggestion of an insurance agent to double the value at only a slight increase. See Defendant's Brief at 44. Defendant also claims that evidence of his sexual affairs was not impeded by his marriage and did not create a need or desire for him to end his marriage. See Defendant's Brief at 45.

The People submit that defendant's plan to commit this murder, although realized more fully after Beard was fired, started several months before the actual murder. We know the defendant, as early as December 2014, had thoughts about getting rid of his wife. As Molly Bourgeois testified, during Christmas 2014, defendant told her that was the last Christmas they would be together as a family (A 3447). It was also in late 2014, early 2015, when the defendant and Kelley's life insurance coverage doubled (A 2657). According to P.J. Gingrich, defendant's life insurance agent, it was defendant who reached out to him when defendant's and his wife's State Farm life insurance policies were up, and sought to increase the life insurance amounts on his family, including increasing his wife's coverage to one million dollars (A 2659). Gingrich was more than defendant's insurance agent, as he golfed with him, and had lunch and drinks with the Claytons (A 2637-2638). In filling out Kelley Clayton's life insurance application, Gingrich put an extra zero on Kelley's income when he submitted the policy to the underwriters, which may have falsely qualified Kelley for the additional insurance (A 2655). Considering these additional factors, it was not unreasonable for the jury to conclude that the increase of Kelley's life insurance was a motive for her murder. Defendant made statements that he wanted to avoid the cost of

divorce. We also know that he was the primary beneficiary of his wife's policy and was entitled to recover one hundred percent of the one million dollar policy upon her death (A 2650-2652).

The People submit that defendant's extramarital affairs were also evidence that defendant had motive to kill his wife because he had lost affection for her and wanted a way out of the marriage that would allow him to avoid the cost of divorce. As the Court of Appeals stated in People v. Harris, 209 N.Y. at 77:

> The rule is well established that when a husband is charged with the murder of his wife it is competent to show his relations with a paramour. The reason for the rule is stated to be that such evidence tends to establish the absence of affection for the wife and a motive for getting rid of her.

Moreover, evidence of motive must possess a "relation to the criminal act according to known rules and principles of human conduct." People v. Namer, 309 N.Y. 458 (1956).

Here, there was proof at trial that defendant, who had several extramarital affairs, had lost affection for his wife. For example, defendant told Molly Bourgeois that not only did he not love his wife anymore, but he did not even like her (A 3446). He told Patricia Stone that he would divorce Kelley but she would take everything (A 2078). Such statements, combined

with the large number of extramarital affairs, showed the jury that defendant had lost affection for his wife and wanted out of the marriage without a financial loss to himself. Here, as noted above, defendant saw a means to escape his marriage by hiring Beard to murder his wife for a potential financial gain.

Indeed, the People submit that defense counsel's claims are short-sighted and fail to take into account defendant's and Beard's planning leading up to the murder. The credible evidence supports the People's theory that there were no evidence of a robbery or burglary, only evidence of murder.

In performing its analysis, the People respectfully ask this Court to consider the weight of all of the evidence in this case, not just the few facts highlighted by defense counsel. Based upon the foregoing, even reviewing the evidence in a neutral light, and giving the jury great deference in having had the opportunity to view the witnesses and assess their credibility, the People respectfully submit that the jury properly gave the evidence the weight it should be accorded, and the verdict must stand.

C. Conclusion

There was a mountain of evidence that defendant orchestrated the murder of his wife by Beard. That the jury would have had to make multiple

inferences is not unexpected; nor does it impair the strength of their conclusion. Reasoning from the facts necessarily entailed finding multiple inferences, but so long as all of the jury's inferences were based on solidly proven facts and all inferences flowed naturally and directly from those facts, the verdict is not flawed. The evidence must be seen as a whole, and not artificially split into unrelated parts. People v. Moran, 246 N.Y. 100, 104 (1927).

Defendant has offered a myriad of inferences that could be drawn to counter the People's evidence. It is, however, insignificant that other inferences could be drawn, so long as the jury could have rationally drawn a guilty inference. Rossey, supra, at 699. Viewing the evidence in the light most favorable to the People and indulging all inferences in the People's favor, the evidence was legally sufficient to support the guilty verdict. People v. Conway, 6 N.Y.3d 869, 872 (2006).

Finally, this is not an appropriate case for this Court to reverse in the interest of justice as suggested by defendant. Defendant's Brief at 23-24. The power to reverse in the interest of justice, pursuant to CPL § 470.15(3)(c), is used sparingly to "vacate a conviction as to which there is a grave risk that an innocent man has been convicted." People v. Kidd, 76 A.D.2d 665, 668 (1st

Dept., 1980) (quoted in White, supra). No such risk exists in the case at bar. People v. Gioeli, cited by defendant, is also inapposite. (People v. Gioeli, 288 A.D.2d 488 [2nd Dept., 2001]). Here, unlike in Gioeli where the complainant's credibility was impeached and it was unlikely the alleged crime occurred, the murder in this case is undisputed. Beard committed it, and a plethora of evidence led to the rational inference that he killed defendant's wife pursuant to their agreement.

The People submit that after weighing any conflicting testimony, reviewing the rational inferences to be drawn from the evidence and evaluating the strength of such conclusions the jury was justified in find defendant guilty beyond a reasonable doubt.

POINT II

DEFENDANT RECEIVED A FAIR TRIAL.

The People provided voluminous discovery and Rosario materials to defendant before and during trial. Concededly, there was delay in providing some of those materials. However, all delays were inadvertent or explainable, and defendant did not at trial, and does not now on appeal, make any showing of prejudice such as would warrant reversal. Nevertheless, he claims error regarding several witnesses. Contrary to defendant's claims, he received the remedies for which he asked and was not prejudiced by any delay.

Defense counsel claims that the defendant was denied a fair trial because the People failed to disclose discovery and Rosario material. See Defendant's Brief at 47. As support for this claim, defense counsel asserted that Rosario material was untimely for the following witnesses: Kimberly Bourgeois, Mark Blandford, Richard Flood, Rebecca White, Michael Lostracco and Sy Ray. See Defendant's Brief at 48. In addition, defense counsel claims discovery violations regarding Sy Ray. See Defendant's Brief at 48.

A. Defendant's allegations of Rosario violations are unsubstantiated.

First, as to Rosario, as the Court of Appeals made clear in People v. Rosario (9 N.Y.2d 286 (1961), rearg. denied 14 N.Y.2d 876), the purpose of the rule "is to afford the defendant a fair opportunity to cross-examine the People's witnesses at trial. See also, People v. Poole, 48 N.Y.2d 144 (1979). The Rosario court found that it was "persuaded that a right sense of justice entitles the defense to examine witness's prior statement, whether or not it varies from his testimony on the stand." Rosario, supra.

The Rosario rule has been codified in CPL § 240.45, which reads:

> After the jury has been sworn and before the prosecution's opening address . . . the prosecutor shall, subject to a protective order, make available to the defendant (a) any written or recorded statement, including any testimony before a grand jury . . . made by a person whom the prosecutor intends to call as a witness at trial and which relates to the subject matter of the witness's testimony . . . .

When, as here, the disclosure of the material was not a complete failure to disclose, but rather, a delay in its disclosure, reversal is not required unless the defendant demonstrates that he has been substantially prejudiced by the delay. See People v. Ranghelle, 69 N.Y.2d 56, 63 (1986); People v. Perez, 65 N.Y.2d 154 (1985), People v. Boykins, 134 A.D.3d 1542, 1543 (4th Dept.,

2015), lv. denied 27 N.Y.3d 1066; People v. Chase, 158 A.D.3d 1233, 1234 (4th Dept., 2018), lv. denied 31 N.Y.3d 1080. Here the defendant has failed to make such a showing. People v. Walters, 124 A.D.3d 1321 (4th Dept., 2015), lv. denied 25 N.Y.3d 1209. Defendant received all the materials before or during trial at such time that he was able to use them at trial, and he failed to show that the delay materially contributed to the result of the trial. People v. Barney, 295 A.D.2d 1001, 1002 (4th Dept., 2002), lv. denied 98 N.Y.2d 166.

As noted in the definition of Rosario, it includes material "which relates to the subject matter of the witness's testimony" and further, that the purpose of the rule is "to afford the defendant a fair opportunity to cross-examine the People's witnesses at trial. Rosario, supra.

1. Kimberly Bourgeois was not a witness for the prosecution.

It is undisputed that Kimberly Bourgeois never took the stand at trial, and therefore any statement she may have previously made, was not Rosario material. See CPL § 240.45. (A 623, 626). As such, any alleged Rosario violation relating to Ms. Bourgeois is moot, as she was never a witness and any material regarding any alleged prior statements made by her did not fall under the Rosario rule. CPL § 240.45(1)(a).

2. There was no Rosario violation for the People's disclosure of material regarding Mark Blandford's polygraph examination.

The People gave delayed disclosure of Rosario material regarding the videotaped recording of Blandford's polygraph examination (A 1525). Nonetheless, defendant has failed to show that the delay substantially prejudiced him. See Ranghelle, supra; Boykins, supra; Chase, supra.

Initially, defense counsel was afforded a fair opportunity to cross-examine Mr. Blandford. See Poole, supra. Defense counsel began cross-examination of Mr. Blandford at 11:45 a.m. (A 1512). Sixteen minutes later, the trial broke for lunch (A 1524). It was over the lunch hour that defense counsel learned of the videotaped polygraph examination of Mr. Blandford (A 1525). As a consequence, defense counsel requested an adjournment to review Mr. Blandford's videotaped polygraph examination before continuing his cross-examination (A 1525). Upon realizing the oversight, the People promptly provided defense counsel with a copy of the videotaped recording and the court adjourned the trial until the next day (A 1526, 1535-1536). During the adjournment, the New York State Police delivered the polygraph test results to defense counsel in his hotel room at 9:30 or 10:00 p.m. that night

(A 1538), and not the next morning as appellate counsel claimed in his brief. See Defendant's Brief at 53-54.

Once trial recommenced, defense counsel did not ask for a further remedy and continued his cross-examination of Mr. Blandford for an additional thirty-one minutes (from 9:37 a.m. through 10:08 a.m.) (A 1542-1561). Thus, although the People inadvertently delayed the disclosure of the videotaped recording regarding Mr. Blandford, defense counsel was able to effectively cross-examine him, and thus the delay did not substantially prejudice the defendant. See Ranghelle, supra; Perez supra. Moreover, the defendant failed to show that the delay materially contributed to the result of the trial. Barney, supra. Here, a perusal of Mr. Blandford's trial testimony reveals that his testimony dealt strictly with his role as a look-out when Michael Beard went to the Clayton home to commit the crime. In fact, when asked on cross-examination whether Mr. Blandford knew the defendant, he testified that he had never met him (A 1513). Furthermore, defendant conceded that Michael Beard murdered Kelley Clayton and this was not an issue at trial of this defendant. See Defendant's Brief at 5, 21, 40. Surely, under these circumstances, any inadvertent delay in handing over Rosario

material regarding Mr. Blandford failed to substantially prejudice the defendant.

3. There was no Rosario violation regarding the People's witness Richard Flood and the People turned over Rosario material about Flood immediately upon receipt.

As to Richard Flood (a representative from the defendant's insurance company), the People did not intend to call Mr. Flood when the trial began. In fact, Mr. Flood was not on the People's original witness list (A 885-890). Indeed, it was only after defense counsel attempted, through cross-examination of witnesses at trial, to develop facts of a burglary as the motive for the murder, that the People decided to call Mr. Flood as a witness to dispel such a claim (A 4324, 4325). During trial, defense counsel questioned Kevin Morris, Senior Investigator Kevin Sucher, Investigators Michael Lostracco, Daniel Armstrong, Brian Kozemko and Jason Fifield and Trooper Thomas McDonnell about an alleged lockbox under the bed containing thousands of dollars (A 1630, 2264-2269, 22999, 2510, 3548-3549, 3189, 3400, 3534). Moreover, during the questioning of Senior Investigator Sucher, the following took place:

> Question: It wouldn't be out of the ordinary to find it. You are on a scene where somebody has been murdered, you have been told that-or maybe you weren't-but

the police know that there was a lockbox that's missing or at least that had been under the bed, you were told that there was a robbery in the house…" (A 2298-2299).

The Court: Counsel, approach. (sidebar). I don't know if you can say that they know there was a lockbox under the bed. They were told there was a lockbox under the bed, but…. (A 2299).

Ultimately, the only information presented at trial regarding the existence of a lockbox came from the defendant, one of the two people involved in the planning of the murder. In fact, in chambers, the trial judge noted that the only proof of a lockbox was that the defendant had told police that there was a lockbox (A 4321).

Moreover, it is worth noting that defense counsel received Mr. Flood's information immediately after the People received the information (A 4324, 4326). Further, a review of the less than 200 pages of material handed over to defense counsel, reveals that almost all of the insurance information was not even Rosario material (A 4321). Seventy-three pages were photographs, and since it was defendant's insurance company, he should have already had a copy of those photographs (A 4322). Many of the pages were emails; however, some of the emails were not Mr. Flood's and were handed over as a courtesy (A 4322). In addition, the material was comprised of copies of

checks defendant had received as payment; estimates provided to defendant, which he turned over to the insurance company; a copy of the rental lease between defendant and his parents (also turned over by defendant to the insurance company); and a claim summary and content (A 4322). Thus, the only Rosario material in the delayed materials was an affidavit from Mr. Flood, dated January 26, 2017 (A 4322).

Finally, the day Mr. Flood testified, trial testimony began at 10:12 a.m., the jury took a break from 11:03 a.m. through 11:16 a.m., and then took lunch at 11:58 a.m. through 1:19 p.m. (A 4355, 4376-4377). The People called Mr. Flood to testify at 2:07 p.m. (A 4405). Thus, ultimately, defense counsel had almost as much time as the People to review the material, having had the time during the break and lunch hour to review. During trial, defense counsel had a full opportunity to cross-examine Mr. Flood (A 4415).

4. There was no Rosario violation for the People's alleged failure to turn over Michael Lostracco's ID-5 report and no prejudice to defendant resulted.

Next, as to Michael Lostracco, defense counsel claims that the alleged failure of the People to turn over an ID-5 report containing field notes of Investigator Lostracco, was a Rosario violation. See Defendant's Brief at 55; (A 2523). The People disagreed and noted for the record that all of the

material had been turned over (A 2689). It appears that throughout this appeal, appellate counsel makes arguments based upon unsupported claims made by trial counsel. The People submit that even if defense counsel did not receive the ID-5 form containing handwritten notes regarding a key found in the glovebox of Tetreault Tetreault's truck, such an alleged failure did not prejudice the defendant, as the key was never found to fit any lock, thus it had no evidentiary value to this case (A 2579).

Furthermore, it is worth noting that after argument in chambers the next morning, and although the People do not concede they did not turn the information over, defense counsel agreed that he could get any information he needed through Investigator Fifield who had not yet been called to testify. (A 2689, 2690, 3507, 3508). In fact, on cross-examination of Investigator Fifield, defense counsel questioned him about the ID-5 form (A 3507, 3508).

B. Defendant's allegations of discovery violations are also unsubstantiated.

The remedies for discovery violations are entrusted to the discretion of the court. Under CPL § 240.70 when a party fails to comply with the discovery mandates, the court "may order such party to permit discovery of the property not previously disclosed, grant a continuance, issue a protective

order, prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action. The overriding concern on appeal is to determine whether a party has suffered undue prejudice.

In this case, none of the claimed violations of Rosario or discovery was shown to have prejudiced the defendant, and the trial court did not abuse its discretion in providing limited remedies. Indeed, in most instances, defendant got the remedy he asked for, and made no further objection. Thus, any claim on appeal that another more severe remedy should have been imposed, is unpreserved. People v. Rogelio, 79 N.Y.2d 843, 844 (1992).

1. Under CPL § 240.20, the People had no obligation to provide discovery of call detail records that were introduced at trial through Rebecca White.

Rebecca White provided and testified to call detail records containing a telephone call made from the landline at M&M Auto to Michael Beard's cellphone on September 28, 2015 at 12:09 p.m. (A 1941-1942).

The People submit that the telephone records were not discoverable pursuant to CPL § 240.20, as they did not concern any physical or mental examination or scientific test or experiment. CPL § 240.20, Thus, the People had no obligation to provide the documents in discovery. CPL § 240.20; compare Sackett v. Bartlett, 241 A.D.2d 97, 101-02 (3rd Dept., 1998), lv.

denied 92 N.Y.2d 806; contrast People v. Brown, 9 N.Y.S.3d 830 (Bronx Cty., 2015). However, defense counsel only requested time to review the materials with his expert. The prosecutor agreed, and there was no further objection (A 1939). When the prosecutor offered the exhibit in question, counsel had no objection, subject to the right of recall (A 1941). Thus, any complaint on appeal is not preserved.

2. The People properly provided all Rosario and discovery materials concerning expert witness Sy Ray.

Finally, as to Sy Ray, appellate counsel has claimed both Rosario and discovery material were not timely provided. Again, as to the Rosario material, this case does not involve the complete failure to disclose Rosario material mandating reversal (see Ranghelle, supra), but a claimed delay in disclosure, which requires reversal only if defendant suffered substantial prejudice as a result. See People v. Martinez, 71 N.Y.2d 937 (1988). Rosario material must be provided at a time when it meaningfully can be used to prepare cross-examination. People v. Mackey, 249 A.D.2d 329 (2nd Dept., 1998), lv. denied 92 N.Y.2d 927. However, material that is not in the People's possession does not constitute Rosario material. People v. Robertson, 256 A.D.2d 254 (1st Dept., 1998), lv. denied 93 N.Y.2d 978.

First, the People provide the following timeline of events:

- Sy Ray was first contacted by the New York State Police about this case shortly before Christmas 2016 (A 488).
- On January 11, 2017, defense counsel was advised that Sy Ray would be called as a witness at trial (A 444). That same day, Leslie Hyman, an investigator for the defense, spoke to Sy Ray and requested access to the TraX system. Mr. Ray spoke to Mr. Hyman at great length about how the mapping worked and explained the type of data that could be expected from Mr. Ray's company. Finally, Mr. Ray advised Mr. Hyman that if he had any questions, to call him (A 489).
- On January 12, 2017, the day before opening statements, the prosecutor stated on the record that he would be calling an expert to analyze location data from several sources and show by film or some type of animation where certain cellphones were at particular times. The prosecutor noted that he did not yet have a report, but was encouraging the expert to provide something as soon as possible (A 1170-1171).

- On January 17, 2017, Mr. Ray provided an initial report to the Chemung County District Attorney, who in turn, provided a copy to defense counsel that same day (A 489, 458).
- On January 18, 2017, Mr. Hyman called Mr. Ray. Mr. Hyman wanted to know what information Mr. Ray had not yet sent (A 489). Mr. Ray advised Mr. Hyman that he, Mr. Ray, was coming to town to do drive testing on January 19, 2017 and asked if they could get together then (A 489).
- On January 19, 2017, Mr. Hyman called Mr. Ray, and Mr. Ray offered to meet with Mr. Hyman. Mr. Hyman stated he was busy and informed Mr. Ray that Mr. Ray could do the local police department a favor and scan the area near the Elmira Correctional Facility (A 489).
- On January 25, 2017, Mr. Ray provided his supplemental report to the Chemung County District Attorney, who then turned it over to defense counsel the same day (A 489, 333).
- On February 6, 2017, defense counsel filed a Motion in Limine requesting a Frye hearing and preclusion of Sy Ray's testimony as an expert witness (A 259-288).

- The People opposed defense counsel's motion and submitted a Memorandum of Law in Opposition, dated February 7, 2017. As attachments to our Memorandum, we included Sy Ray's initial report, Supplemental Report, Curriculum Vitae and a newspaper article (A 289-318).
- On February 8, 2017, the court denied the request for a Frye hearing and ruled that testimony concerning data mapping would be permitted, but precluded testimony concerning call pattern analysis (A 3953).
- On February 8 and February 9, 2017, Sy Ray testified on direct examination (A 3967-4126). The February 9 testimony lasted an hour and a half (10:10 a.m.-11:49 a.m.), and defense counsel had the rest of the day to prepare for cross-examination (A 4077-4126).
- The next day, February 10, 2017, Sy Ray was subject to six hours of cross-examination (A 4128-4290). Further, after redirect by the District Attorney (A 4290-4303), Sy Ray was subject to re-cross-examination (A 4303-4307).

Based upon the above, it appears that the only item not disclosed as of February 7, 2017, was Sy Ray's final report. It is certainly worth noting that the information provided prior to February 6, 2017, was sufficient for defense counsel to make a motion for preclusion. In the motion papers, and attached Affidavit of Leslie Hyman, the defense had a clear understanding of, and consulted their own expert, regarding Sy Ray's ability to take telephonic data from a number of sources, plotting that data into a computer system, which resulted in establishing movements, over a period of time, of the mobile devices associated with people involved in this case (A 281).

Next, once Sy Ray took the stand and testified the first day and an additional hour and a half the second day, defense counsel had the entire afternoon and evening to prepare for cross-examination the next day (A 4126, 4128). During the lengthy cross-examination, defense counsel demonstrated a firm understanding of the material and tried tenaciously, but unsuccessfully, to elicit contradictory responses from the witness (A 4128-4290). He definitely was consistently able to talk "Sy Ray's language." For example:

> Q: And the next one, 2555 is at 3:58 minus four, so that's 11:58:19, and the coordinates are 41.95237 minus 76.9884, right?
> A: …
> Q: It's within 3,638 meters, right?
> …

Q: So, again, this is the 11:58 call, this is the 11:44 call, this is the 11:42 call and at the bottom one is irrelevant to our discussion right now. So these are four calls, 2554, 55, 56 and 57, right?
A: They're not calls, but that is the data.
Q: Data transmission events captured by Google at those particular times, right?
A: Correct (A 4157).

Clearly, reviewing the cross-examination as a whole, the People submit that it is impossible to conclude that defense counsel did not have a reasonable time to review the Rosario and/or discovery material before cross-examining Sy Ray (A 4128-4290). Defendant failed at trial and now on appeal to show that he was prejudiced by any delay or that the delay materially contributed to the outcome of the trial.

Finally, it is also worth noting that defense counsel never requested an adjournment to allow any expert to testify. Clearly, defense counsel had been conferring early on with Vladin Jovanovic, an expert in the field (A 3943). Further, Leslie Hyman, another claimed expert, was available for trial. Additionally, the judge properly denied defense counsel's inappropriate request to question Ray outside the presence of the jury as a "form of a sanction" (A 4068). (Contrary to appellate counsel's claim that trial counsel should have been permitted to question Ray "for the court to determine the appropriate sanction for the discovery violation," (Defendant's Brief at 58),

that was not the request made at trial.) Defense counsel also asked for time to review the materials (A 4068) and was accordingly granted the afternoon and evening of February 9. He made no objection.

Trial counsel also mentioned preclusion of Ray's testimony in his Motion in Limine, but he did not provide any argument to support that request. Preclusion is a drastic remedy, not to be imposed unless lesser sanctions are inadequate. People v. Jenkins, 98 N.Y.2d 280, 284 (2002). In oral argument on February 8, it was clear that the defense's preclusion request was based on the claims that Ray was not qualified as an expert and that this was junk science (A 3937-3943). The request was not grounded in the defense's present claims on appeal of Rosario or discovery violations. Accordingly, any claim on appeal that the court erred in not precluding the testimony is not preserved. Defendant got the extra time he requested and did not seek more. He had the materials he needed to cross-examine Ray and did so vigorously and thoroughly.

On appeal, defendant argues that preclusion was warranted under the holding in People v. Kelley, 19 N.Y.3d 887 (2012), but this reliance is inapposite here. In Kelley, a course of sexual conduct against a child case, it was discovered during trial that the prosecution had not had DNA testing done

on a towel that the girl's mother had turned over to police. The prosecution then procured DNA testing, which revealed the presence of defendant's semen and the DNA of a female, but not the complainant's. Here, the defense knew before opening statements that the People intended to call an expert witness who would take data provided by Google, Verizon, AT&T, and GPS and through use of a computer program, pinpoint where certain phones and activity was located. The prosecutor also noted that he did not yet have a report and would not have it before opening statements (A 1170-1171). Thus, unlike the situation in Kelley, there was no surprise and ignorance of the evidence was not a defense.

Moreover, defense counsel was clearly thoroughly familiar with the material related to Ray's testimony by the time he cross-examined him. The prosecution acted in good faith and provided materials as soon as possible. Under these circumstances, it cannot be said that the trial court abused its discretion in permitting Sy Ray to testify despite the fact that his report was not available until mid-trial.

In sum, many of the present claims are unpreserved for review on appeal, and as to those that are preserved, defendant has failed to show the

required prejudice. The trial court did not abuse its discretion and its decisions should be affirmed.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S REQUEST FOR A FRYE HEARING.

The trial court did not abuse its discretion in denying defendant's mid-trial motion for a Frye hearing. Frye v United States, 293 F. 1013 (D.C. Cir., 1923). The court found that the evidence in question did not involve a novel scientific technique, and defendant's claims largely concerned issues of foundation and weight, which were properly dealt with during the trial. Nevertheless, on appeal defendant claims that a Frye hearing was required because the evidence involved unreliable and novel scientific technique. He is wrong for several reasons. First, the data on which the People's expert, Sy Ray, relied was admitted without objection through other witnesses and therefore any arguments as to the data underlying Sy Ray's mapping software are unpreserved for the appeal. Second, and even if that issue was preserved for appeal, the technical data that Sy Ray visualizes with his software is the kind of data that has been held to be admissible for this purpose in courts around the country. Finally, in denying the motion for a Frye hearing, the court was entitled to take notice of the acceptance of the data and methods, as well as the judicially recognized separation of Frye issues from issues of

weight and foundation. The court had before it the arguments of both parties before it rendered its decision, and it cannot be said as a matter of law to have abused its discretion in denying a hearing.

To the extent the weight of Sy Ray's testimony is concerned, his expertise and the merit of the science underlying his conclusions are beyond the scope of a Frye analysis. Ray merely plotted that data onto computer-generated maps and made general estimates of where the defendant's and Michael Beard's phones were at certain times. Those estimates were general location approximations in this largely rural landscape and were made in consideration of the inaccuracies inherent in the data and the methodology.

A. Standard of Review

Whether a Frye hearing is required is a matter directed to the trial court's discretion. DeLong v. County of Erie, 60 N.Y.2d 296 (1983); People v. Rivera, 167 A.D.3d 550 (1st Dept., 2018); People v. Marusich, 51 A.D.3d 1201, 1202 (3rd Dept., 2008). An appellate court reviews the trial court's decision for abuse of that discretion.

The law is clear, a Frye hearing is held solely to determine the admissibility of scientific evidence at trial. Unites States v. Williams, 583 F.2d 1194 (1978), cert. denied 439 U.S. 1117; People v. Wesley, 83 N.Y.2d

417 (1994); People v. Middleton, 54 N.Y.2d 42 (1981). If evidence does not involve new methods of proof or new scientific principles, then the Frye inquiry is not necessary. State v. Hayden, 90 Wash. App. 100 (1998). Significantly, the Frye analysis has no interest in the merit or persuasiveness of a particular theory or technique. Rather, a proper Frye analysis involves "counting scientists votes" rather than "verifying the soundness of a scientific conclusion." See Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 446-447 (2006), rearg. denied 8 N.Y.3d 828.

The People also note the limited scope of this Court's review. Defendant argues on appeal that this Court can review not only the complete record of the trial proceedings, but also the record developed after the verdict. See Defendant's Brief, at 84-85. Defendant filed a post-verdict motion pursuant to CPL § 330.30 seeking to set aside the guilty verdict, in part on the ground that new evidence had been discovered since the trial concerning the evidence provided by the People's expert, Sy Ray (A 329-330). Although, in determining whether a trial court ruled correctly in a motion in limine, it is appropriate for a reviewing court to consider a retrospective view of the trial record, it is not appropriate to consider post-verdict proceedings. In People v. Giles, 24 N.Y.3d 1066, 1068 (2014) cert. denied 136 S. Ct. 32, the Court of

Appeals ruled that "CPL 330.30(1) [does] not permit defendants to expand the record to include matters that did not 'appear[] in the record' prior to the filing of the motions." A similar rule is appropriate concerning review of motions in limine. Clearly the trial court did not have the "newly discovered" evidence before it when it ruled, or at any time during the trial when it could have reversed or modified its ruling if requested to do so. Just as a CPL § 330.30 motion does not serve to preserve a question of law for review (see People v. Padro, 75 N.Y.2d 820, 821 (1990) rearg. denied 75 N.Y.2d 1005), a post-verdict motion should not be permitted to expand the record on which the court's trial rulings are reviewed. Defendant's citations to cases involving severance rulings and permitting appellate review of the entire trial to determine whether an abuse of discretion occurred, are not to the contrary. They do not deal with post-verdict proceedings, but rather are limited to trial proceedings. Accordingly, the defendant's submissions in his CPL § 330.30 motion, including an affidavit and report of their expert attacking the evidence presented by the People's expert, should not be considered in reviewing the trial court's exercise of discretion in denying the defendant's motion in limine seeking a Frye hearing.

B. Procedural history and defendant's arguments on appeal

Mid-trial, defendant filed a motion seeking a Frye hearing. In the affidavit attached thereto, Leslie Hyman, a retired New York State Police Senior Investigator, detailed the defense objections to the admissibility of the proposed testimony of Sy Ray. Hyman noted that he had consulted with Dr. Vladan Jovanovic and focused on the late discovery of data related to Ray's proposed testimony, claimed errors in his process, and the lack of accuracy in the underlying data. He concluded that Ray's "analysis and manipulation of available data is incomplete and misleading" and constituted "junk science." In an accompanying Memorandum of Law, defense counsel argued that Ray's technique was a novel one that was not generally accepted as reliable in the scientific or technological community; that no proper foundation had been established for the evidence; that Ray's "conclusions rested on inherently and statedly inaccurate data measurements;" that Ray was not qualified to present expert testimony; and that the jury did not need an expert witness to help interpret the data. The Memorandum also noted that Dr. Jovanovic had been consulted and would be available to testify via Skype at a Frye hearing.

The People responded in a Memorandum of Law that the motion should be denied. They argued that the defense had confused Frye issues with those regarding foundation and weight; the claims regarding data used were foundation issues and the remaining claims related solely to the weight to be accorded the evidence. They argued further that the techniques and tools used by Ray did not constitute a scientific method, procedure or technique, and thus were not subject to Frye constraints; Ray merely used information previously admitted into evidence to create a file that allowed for the visualization of the data. As such it did not involve a "novel scientific technique" and did not require a Frye hearing. They also laid out Ray's extensive experience with law enforcement and working with cellphone data which entitled him to testify as an expert in this field. Finally, they argued that this was an area not within the ordinary training and intelligence of the jury, and that Ray's expert testimony would be helpful to the jury.

Oral argument of the motion occurred on February 8, 2017. Defense counsel argued that Ray's conclusions were misleading and not accurate. Counsel again mentioned that he had spoken to Dr. Jovanovic (A 3937-3943). The People contended that the defense was raising foundation issues, not a Frye issue. Ray had basically taken "the information that's already admitted

into evidence here between the telephone records, the videotapes, the Google information, the GPS information and has plotted that out on a map, a Google map" (A 3943-3944). He suggested that if the defense wanted to make this a battle of the experts, he should bring his expert in. The prosecutor also countered the defense argument that this was just summation material, noting that Ray would be pulling together the various resources in evidence to show how they relate to each other. Especially in light of the voluminous amount of data, this was clearly beyond the ken of the jury and would be helpful to them (A 3945-3948). Before argument began, the court made clear that it would not allow testimony about "the psychological effect of phone calls;" after arguments, it ruled it would not allow testimony on the call pattern analysis, but otherwise would allow Ray to testify without a Frye hearing concerning data mapping, which would be subject to cross-examination (A 3937, 3953). Thereafter, defense counsel put on the record the basis for his objection to Ray's testimony as 1) he was not qualified; 2) the testimony was being proffered in the nature of summation; and 3) they had been "spoon-fed" the discovery on Ray. He further objected to the use of Ray's thumb-drive of pictorial depictions, and asked that, if it was to be allowed, it be used for illustrative purposes only and not for use by the jury (A 3961-3963). After

reviewing the timeline of disclosure, the prosecutor suggested that he would ask Ray to make "screenshots" of certain material and that the court should wait until the end of Ray's testimony to see how it felt then. The court agreed (A 3965).

On appeal, defendant claims the trial court committed reversible error by admitting exhibits and expert testimony through Sy Ray, which included an animation regarding locations of the defendant and Michael Beard's cellphone at critical times, without conducting a Frye hearing. See Defendant's Brief at 73. According to the defendant, the Frye hearing would have allowed the court to determine: (1) whether the evidence was based on analysis which had acceptance of reliability within the relevant scientific community, and (2) whether the methods of analysis were appropriately applied to establish a foundation for the admission of this evidence. See Defendant's Brief at 73. The defendant further argues that there was no proof that the testimony and exhibits regarding the specific locations of the telephone devices and drive test scans, conducted sixteen months later, were based on accepted and reliable methodologies accepted within the relevant scientific or technical community. See Defendant's Brief at 73-74.

C. **The issue is not preserved for appeal to the extent it is based on data underlying Sy Ray's mapping tool, because all was admitted without objection. Any Frye issue in this appeal must be limited solely to Sy Ray's mapping tool.**

Sy Ray utilized telephone records from AT&T and Verizon, GPS, Google Earth and Google location information, and Fleetmatics GPS tracking information for the ServPro vehicles as source data for developing estimates of the locations of defendant's and Beard's cellphones at certain times. The source data was all admitted without objection prior to defendant's motion for a Frye hearing (Fleetmatics) (A 2740); (Google) (A 2198-3200, 3204, 3208); (Verizon) (A 3213, 3217-3220, 3222, 3228); (AT&T) (A 3295-3319); (extractions from Michael Beard's cellphone) (A 3561-3581); (extractions for defendant's phone) (A 3773-3898). Thus, although defendant on appeal questions the use of Google location data on the ground that it has not been accepted within the relevant scientific community, he did not object to the admission of that data or specifically to its use in evidence. He has not preserved his argument as to that data.

D. Even if the issue were preserved for appeal, the cellphone and GPS data underlying Sy Ray's analysis has repeatedly been found to be admissible, as it does not involve novel science.

The People assert further that a Frye hearing was unnecessary because the use of cellphone location data and GPS data does not involve a novel scientific procedure. In People v. Littlejohn, 112 A.D.3d 67 (2nd Dept., 2013) Iv. denied 22N.Y.3d 1140, for example, the appellate court found that the lower court properly denied the defendants' request for a Frye hearing regarding cellular phone tracking testimony proffered by the prosecution, because it did not concern a novel scientific theory, technique or procedure but instead, involved deductions made from cellphone site data in a manner consistent with a generally accepted scientific process. Moreover, many courts have recognized GPS tracking without conducting a Frye hearing. See United States v. Brooks, 715 F.3d 1069 (8th Cir. 2013) (courts have generally assumed the accuracy of GPS tracking); United States v Lizarraga-Tirado, 789 F.3d 1107, 1109 (9th Cir. 2015) (suggests courts can take judicial notice of Google Earth); Carniol v. New York City Taxi, 126 A.D.3d 409, 410-11 (1st Dept., 2015) (no Frye hearing warranted regarding GPS evidence because it did not concern a novel scientific theory, technique or procedure); Still v.

State, 917 So.2d 250, 251 (Fla. Dist. Ct. App. 2005) (OnStar system not new or novel) cited in People v. E.H., 2018 Cal.App. Unpub. LEXIS 6005 (testimony concerning Find My iPhone App not new or novel scientific evidence).

Here, Ray also took the raw call detail records from cellphone providers and uploaded that information and produced a visual map of the data (A 3968). The People submit that using cell site location information to plot points on a map is not new or novel. The first case in New York to deal with using cell site location information given by a provider used to track a person's movements was in 2011. See People v. Hall, 86 A.D.3d 450 (1st Dept., 2011), lv. denied 19 N.Y.3d 961. Having been utilized for at least five years at the time of trial, this Court found that it was not new or novel. See also, People v. Wooten, 283 A.D.2d 931 (4th Dept., 2001) lv. denied 96 N.Y.2d 943. Thus, at the time of trial in 2017, using cell site location information to plot points on a map had been used for at least six years. Following the logic, if at five years this Court found that this procedure was not new and novel, then surely at six years, the procedure was not new or novel.

For instance, a Washington court held that cell site location testimony is not novel; it is widely accepted throughout the country. Ryan W. Dumm,

The Admissibility of Cell Site Location Information in Washington Courts, 36 Seattle U. L. Rev. 1473, 1501-02 (2013) ("With respect to reliability, a Frye inquiry is unnecessary."); see also, Hill, 818 F.3d at 298, supra, ("Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. It shows the cell sites with which the person's cellphone connected, and the science is well understood."). Other courts have held the same, including: Illinois (People v. Fountain, 2016 IL App (1st) 131474, 407 Ill. Dec. 185, 62 N.E.3d 1107); Maryland (Stevenson v. State, 222 Md. App. 118, 134, 112 A.3d 959 (2015)); and Georgia (Pullin v. State, 272 Ga. 747, 534 S.E.2d 69 (2000) (holding that "historical cell site analysis technology "has reached a scientific stage of verifiable certainty to be admissible.").

Moreover, "the use of cellphone location records to determine the general location of a cellphone has been widely accepted by numerous federal courts. See United States v. Jones, 918 F.Supp.2d 1 (D.D.C.2013) (citations omitted), and Stevenson v. State, 222 Md. App. 118, 134 (2015), cert. denied 443 MD 737.

E. No Frye hearing was warranted for Sy Ray's mapping tool, which merely created a visual representation of otherwise accepted and admissible data, as it did not constitute a scientific method, procedure, or technique, much less a "novel" one.

A Frye hearing is held solely to determine the admissibility of novel scientific evidence at trial. Wesley, supra. If evidence does not involve new methods of proof or new scientific principles, then the Frye inquiry is not necessary. State v Hayden, 90 Wash. App. 100 (Wash. App. Ct. 1998).

Initially, the People submit that a Frye hearing was not necessary in this case because the use of the cellphone location data did not involve a scientific procedure. The mapping of cellphone location information merely aided the jury in seeing something that was already there but that was enhanced with the aid of visually mapping. See People v. Wooten, 283 A.D.2d 931 (4th Dept., 2001) lv. denied, 96 N.Y.2d 943) ("the use of lumi-lite was not a scientific procedure, the lumi-lite merely "'aids the jury in seeing something that was already there but that was enhanced with the aid of the lumi-lite. It was used "much in the same manner as powder is utilized to cause latent fingerprints to become visible for taking and analyzing").

Sy Ray's analysis does not amount to a novel scientific technique. Rather, it is merely a visual aid that makes voluminous, and scientifically and legally accepted technical information, comprehensible to a lay jury. To put this in perspective, the raw data included information from two cellphones and amounted to sixty thousand records (A 3984). Making visualization easier, Sy Ray color-coded the information on the map using red for the defendant's information and blue for Beard's information (A 3984, 3988, 3989). Prior to mapping the information, Sy Ray had no information about the case; he allowed the records to speak for themselves (A 3985). The map was produced in a KML file that could be used in any Google Earth program (A 3986). Sy Ray, upon cross-examination, stated that none of the information he received from Verizon, AT&T or Google used to produce the report was altered in any way; it was math (A 4140). Based upon this testimony, the People respectfully submit that Sy Ray's testimony did not involve a scientific procedure or technique implicating Frye. Rather, it involved plotting points created from radio communications emitted from a source (a cellphone) to a receiver (a network of cell towers)-on a map.

In People v. Fountain, (2016 IL App (1st) 131474, lv. denied, 65 N.E.3d 844 (Ill. 2006), the court determined the trial court did not err in denying

a Frye hearing. It held that the reading coordinates of cell sites from phone records and plotting them on a map is not a scientific procedure or technique implicating Frye. See also, People v. Williams, 2017 Il. App. (1st) 142733, lv. denied 94 N.E.3d 670 (Ill. 2018).

This entire process was not a novel scientific procedure. "Deduction, extrapolation, drawing inferences from existing data, and analysis are not novel methodologies and are accepted stages of the scientific process. Ratner v McNeill-PPC, 91 A.D.3d 63, 74 (2nd Dept., 2011), quoted in Krackmalnik v Maimonides Med Ctr, 142 A.D.3d 1143, 1144 (2nd Dept., 2016). So long as "the thing from which the deduction is made…[is] sufficiently established to have gained general acceptance in the particular field in which it belongs" (Frye, supra at 1014, quoted in Parker v Mobil Oil Corp, 7 N.Y.3d 434, 447 [2006], rearg. denied 8 N.Y.3d 828), there need be no Frye hearing. As the trial court found, Ray's use of data to produce maps was not a novel scientific procedure. See State v Paton, 419 S.W.3d 125, 129-30 (Mo Ct App 2013) (plotting the coordinates of cell sites from phone records on a map is not a scientific procedure or technique and Frye is not applicable).

If this court finds that the method of plotting cell site location data is a scientific procedure, a Frye hearing was not necessary because plotting cell site location data on a map has been widely accepted in the courts.

Here, again, the law is clear, a court need not hold a Frye hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. See People v. LeGrand, 8 N.Y.3d 449 (2007). Put more concisely, a court may find a scientific test reliable based on general acceptance as shown through judicial opinion. See Lahey v. Kelly, 71 N.Y.2d 135 (1987).

For example, in People v. Wilson, (107 A.D.3d 919 (2nd Dept., 2013), lv. denied 21 N.Y.3d 1047), the court held that given the longstanding acceptance of fingerprint evidence by New York courts. See People v. Roach, 215 N.Y. 592 (1915); People v. Burnell, 89 A.D.3d 1118 (3rd Dept., 2011, lv. denied 18 N.Y.3d 922; People v. Wofford, 66 A.D.3d 1404 (4th Dept., 2009), lv. denied 13 N.Y.3d 943; People v. Garcia, 299 A.D.2d 493 (4th Dept., 2002), lv. denied 99 N.Y.2d 614), the County Court properly determined that a Frye hearing was not necessary.

In the instant matter, the trial judge stated, after the People conceded that the "cell pattern and stress analysis" sections of Sy Ray's initial report

would not be allowed in front of the jury, "the data mapping was garden-variety cellphone stuff" (A 3937). Subsequently, the trial judge, in his discretion, denied the defendant's request for a Frye hearing (A 3937).

F. Frye analysis does not involve the merits of an underlying scientific principle or procedure. The weight of such is the province of the jury, to which this Court should defer.

Furthermore, Ray repeatedly made clear that he was providing only estimates of phone locations. He acknowledged that the data provided by Verizon, AT&T, and Google could not be used to achieve precise locations, and continually evidenced a respectful awareness of the limitations of the technology (A 3977-3980, 3984, 3992, 4025, 4028, 4039, 4043, 4045, 4047, 4156, 4157, 4162, 4163-4164, 4171, 4192-4194, 4248-4249, 4296; on cross-examination 4856-4861). Ray's testimony thus "made the jury aware not only of the technique's potential pitfalls, but also of the relative imprecision of the information he gleaned from employing it in this case. United States v Hill, 818 F.3d 289, 299 (7th Cir., 2016) (cautioning the government not to present historical cell-site evidence without "clearly indicating the level of precision – or imprecision-with which that particular evidence pinpoints a person's location at a given time."). In the Hill case, the court stated that a cellphone

transmits and receives signals throughout a cellular network like a two-way radio. Just as noted in that case, Sy Ray testified that a cellphone was nothing more than a radio using radiofrequency to communicate with cell towers (A 3974, 3983, 3991).

In light of Ray's repeated disclaimer of precision in his estimates of phone locations, defendant's reliance on United States v. Evans (892 F. Supp. 2d 949 [ND Ill 2012]) is misplaced. See Defendant's Brief at 104. In Evans the proposed testimony purported to show "that calls placed from Evans' phone during the course of the conspiracy could have come from the building where the victim was held for ransom." Evans, supra at 951. In the case at bar, the witness made no claim for such precision, and indeed repeatedly explained that he could give only a general location. See also, United States v. Machado-Erazo, 950 F. Supp. 2d 49, 57 (D.D.C., 2013) (Evans distinguishable from cell site testimony that goes only to general location.)

Ray testified that he performed drive test scans to improve the accuracy of his location estimates. He testified that the scans were accomplished by driving throughout the entire area a route from Beard's home to the victim's home and from there to 75 E. 5th Street (A 4106). He described the process and equipment used. His goal was to see what a phone sees "when it decides

to hand off or select a primary tower." From that he determined what towers a phone would utilize along the route (A 4107-4108). He explained that distance to the tower was not the determinative factor – one must understand the area, including elevation (A 4109). On cross-examination he agreed that other factors such as atmospherics, moisture, foliage and others were also relevant (A 4255).

Defendant's attack on the reliability of the method and results from the drive scans is based in large part on Dr. Jovanovic's report filed with the CPL § 330.30 motion after the verdict. See Defendant's Brief at 93-94. As noted earlier, such post-verdict materials should not be used to bolster his argument on appeal that the court wrongly denied a Frye hearing. In any event, drive tests have generally been approved, and the attacks posed by defendant go more to weight and foundation than to Frye considerations.

Defendant's reliance on United States v Cervantes (2015 US Dist. LEXIS 127048, 2015 WL 5569276 [N.D. Cal Sept. 12, 2015]), is misleading. See Defendant's Brief at 108. After the Court denied the defense motion for a Daubert hearing, it did conclude that because of the delay between the time of the events in question and the field experiments conducted by the FBI, additional foundation was necessary to establish that the witness accounted

for possible differences in the cellphone or antenna characteristics, reception and wave propagation in its field test conditions as compared to those relevant to the facts of the case. The Court gave the government the opportunity to submit supplemental declaration addressing these foundational issues. Id. at 12. After supplemental declarations indicated that cell tower locations and sector azimuths at the time of the crime matched those at the time of the field experiment, the Court denied the motion to preclude the testimony. Cervantes, 2015 US Dist LEXIS 161910, 2015 WL 7734281 (N.D. Cal. December 1, 2015).

Defendant's cite to State v. Phillips, 163 A.3d 230 (MD App. 2017) is also misleading. See Defendant's Brief at 107. To be sure, the trial court did exclude RF signal propagation maps and related expert testimony on drive tests. However, the State filed a request for an en banc review of that order. The en banc panel held a hearing and memoranda were filed, after which the Court reversed the trial court. It held that the trial court abused its discretion by conducting a Frye-Reed hearing and excluding the drive test evidence. Phillips v. State, 233 Md. App. 184, 195-196, 163 A.3d 230 (Ct. of Spec. App. MD 2016). On appeal from that order, the Court of Special Appeals held that the en banc panel lacked jurisdiction and reversed the en banc panel

on that ground. Id. On further review, the Maryland Court of Appeals, expressly noting that it did not concern itself with the substance of the panel's decision, agreed with the court of special appeals that no appeal could be taken to a court en banc. State v Phillips, 457 Md. 481, 179 A.3d 965 (2017). This hardly provides clear support for appellant's claim.

In any event, Phillips trial court exclusion of the drive test has not been followed by any court. To the contrary, several courts have expressly held that drive testing testimony is sufficiently reliable to form the foundation for expert testimony "if the expert acknowledges that drive testing only produces an approximation of a cellphone's location and the expert adequately accounts for elements that could affect the test's accuracy. United States v. Morgan, 292 F. Supp. 3d 475, 485 (DC Dis Ct 2018); see also United States v. Frazier, 2016 US Dist LEXIS 126479, 2016 WL 4994956 at 6 (Dist. of Nev. 2016) (citing numerous cases acting drive test as an accepted methodology); State v Montanez, 185 Conn. App. 589, 619-623 (2016). In the case at bar, Ray adequately accounted for the factors that would have impacted the accuracy of his scans.

Additionally, it warrants repeating that in a Frye analysis, it is not the role of the court to evaluate and appraise the merits of the scientific technique

under consideration. As the Court of Appeals has repeatedly counseled, a proper Frye analysis involves "counting scientists votes" rather than "verifying the soundness of a scientific conclusion." See Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 446-447 (2006); Wesley, supra; LeGrand, supra; see also, People v. Debraux, 50 Misc.3d 247 (New York Co., 2015).

Defendant's motion seeking a Frye hearing and many of his arguments on appeal, focus on claimed errors in Ray's process and lack of accuracy in the underlying data. Such considerations are more properly part of the foundation for admission and the weight to be accorded the testimony. Such considerations are not part of the Frye inquiry, and they should not be improperly commingled. Wesley, supra.

Thus, experts can and do disagree about estimates of signal strength or what factors are relevant to the accuracy of drive scans or any number of questions related to the reliability of the specific evidence. However, these do not impact the fundamental methodology of using the data to make reasonable, although not precise, estimates of phone locations. See Fountain, supra (argument that the witness's method represented the least accurate way of estimating a cellphone's location goes to weight, not admissibility); Parker, supra (questions of the specific reliability of procedures followed to generate

the evidence offered at trial are questions related to foundation for the reception of the evidence, not to Frye concerns); People v. Kelly, 288 A.D.2d 695, 696 (3rd Dept., 2001) Iv. denied 97 N.Y.2d 756 (arguments concerning the qualification of the expert witness relate to issues of foundation and weight to be explored on voir dire or cross-examination).

Frye inquiry as to whether scientific technique is generally accepted as reliable by scientific community is "separate and distinct" from inquiry as to whether technique was appropriately employed in a particular case. Arguments as to the accuracy of the procedure and its effect on the ultimate test results go to the weight of the evidence, rather than to the question of admissibility upon which it is based. As such, they may be addressed by cross-examination or through the use of defense expert witnesses. See Wesley, supra. The People presented ample evidence of Ray's qualifications to testify as an expert, and the court properly accepted him as such. Disagreements concerning how Ray carried out his testing and the reliability of his conclusions were the subject of extensive cross-examination and argument. The jury was, therefore, thoroughly aware of the issues.

G. Conclusion

The trial court did not err in denying a Frye hearing. Should this Court disagree, the remedy is to hold the appeal in abeyance and remit the case to the trial court for a posttrial Frye hearing. See e.g. People v. Wilson, 164 A.D.3d 1012 (3rd Dept., 2018); People v. Hilton, 140 A.D.3d 1176 (2nd Dept., 2016).

POINT IV

THE TRIAL COURT DID NOT ERR BY FINDING THAT VLADAN JOVANOVIC'S AFFIDAVIT WAS NOT NEWLY DISCOVERED EVIDENCE.

The power to vacate a judgment upon the ground of newly discovered evidence rests within the discretion of the trial court. People v. Hazelton, 58 A.D.2d 945 (3rd Dept., 1977). The question on appeal is whether the trial court abused its discretion in denying the defendant's motion. CPL § 330.30; People v. Slaugther, 37 N.Y.2d 596 (1975); People v. Bryan, 270 A.D.2d 875 (4th Dept., 2000), lv. denied 95 N.Y.2d 904; Hazelton, supra.

The People respectfully submit that the trial court correctly denied defendant's motion to set aside the verdict, without a hearing, brought pursuant to Criminal Procedure Law § 330.30(3).

CPL § 330.30(3) states:

> a verdict may be set aside when new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

The defendant contends that the affidavit of Vladan Jovanovic, obtained after defendant's conviction, disclosed newly discovered evidence

sufficient to warrant granting a new trial, or at least a hearing on the CPL § 330.30 motion. See Defendant's Brief at 113-133. The defendant raises the following three claims: (1) the trial court erred by ruling that the information in Vladan Jovanovic's affidavit was not newly discovered; (2) the information provided by Vladan Jovanovic could not have been produced at trial even with due diligence; and (3) had the information provided in Vladan Jovanovic's affidavit been admitted at trial, the verdict probably would change if a new trial is granted. See Defendant's Brief at 113-133. In sum, the defendant claims that as a consequence of the People's late disclosure and production of underlying materials, information, and work product of Sy Ray, the information and report provided by Vladan Jovanovic could not have been disclosed earlier by the exercise of due diligence. See Defendant's Brief at 117.

The seminal case of People v. Salemi, 309 N.Y. 208 (1955) cert. denied 350 U.S. 950, sets forth the criteria for determining the sufficiency of the new evidence as: (1) it must be of such nature as would probably change the verdict should a new trial be granted; (2) it must have been discovered since the previous trial; (3) it must be of such nature that it could not have been discovered before the trial by the exercise of due diligence; (4) it must be

material to the issue; (5) it must not be cumulative to the former issue; and (6) it must not be impeaching or contradictory of former evidence. These criteria have been repeated and relied upon since the advent of the present statute. See People v. Bailey, 144 A.D.3d 1562 (4th Dept., 2016).

To establish that evidence is newly discovered, a defendant must show "that the evidence could not have been discovered before or during trial and produced at trial in the exercise of due diligence by the defense. See People v. McCullough, 275 A.D.2d 1018 (4th Dept., 2000), lv. denied 95 N.Y.2d 933; People v. Carrier, 270 A.D.2d 800 (4th Dept., 2000) Iv. denied. 95 N.Y.2d 864. In People v. Brown, this Court held that the evidence was not in fact newly discovered inasmuch as the defendant allegedly learned of that evidence on the evening before summations and thus had an opportunity to use it before the case was submitted to the jury. People v. Brown, 104 A.D.3d 1203 (4th Dept., 2013), lv. denied 21 N.Y.3d 1014. See also, People v. White, 272 A.D.2d 872 (4th Dept., 2000) Iv. denied. 95 N.Y.2d 859. Further, a defendant must show that the new evidence would have probably, not merely possibly resulted in a more favorable verdict to the defendant if it had been received at trial. CPL § 330.30; People v. Rivera, 108 A.D.2d 829 (2nd Dept.,

1985). In this regard, evidence that does not tend to exculpate the defendant is insufficient. People v. Wadley, 108 A.D.2d 943 (2nd Dept., 1985).

Defendant in the case at bar did not meet his burden of establishing either that the proffered evidence was discovered since the end of the trial or that he could not with due diligence have discovered it in time to use it at trial. To the contrary, Jovanovic's affidavit and report, on which the motion rested, addressed four main areas of Sy Ray's testimony, each of which were known at trial and were dealt with either in the direct or cross-examination of the People's expert, as well as in the arguments and summations of both parties. Furthermore, defense counsel consulted with his expert, Dr. Jovanovic, before and during trial, and indeed considered putting him on the stand. Appellate counsel argues that the proffered evidence was crucial for his defense, yet significantly, as the trial court noted, no application was made during trial for an adjournment to secure it. People v. Davis, 43 N.Y.2d 17, 28 (1977) cert. denied 435 U.S. 988. Appellate counsel argues that a continuance request would have been futile, since it would have required adjourning the trial for an extended period of time – he claims it took Jovanovic "two months of tedious work" (Defendant's Brief at 120), to reach his conclusions. See also, Defendant's Brief at 119-124. That assertion is undermined by trial counsel's

admission that he had been consulting with Jovanovic throughout the trial, and that he "almost put him on the stand;" by the omission from Jovanovic's affidavit of any dates when he did his analysis or any claim that he was unable, unwilling or unprepared to testify at trial; by the availability before or during trial of all the materials used by Jovanovic; and by trial counsel's obvious awareness of and competence with all the issues later raised by Jovanovic in his affidavit and report. After Ray's testimony, the People put on six more witnesses, the defense called ten witnesses, and there were six days until the case was sent to the jury. Defendant has not demonstrated by a preponderance of the evidence that Jovanovic could not have been prepared and called as a witness within that timeframe or with a short continuance.

Whether trial counsel decided not to put Jovanovic on as a trial witness for financial reasons or as a shrewd calculation that the expert would be more useful in a post-verdict motion if there was a guilty verdict, it does seem clear that it was his choice. Under these circumstances, the trial court did not abuse its discretion by denying defendant's CPL § 330.30 motion. Having made this choice, defendant was not entitled to a new trial on the claim that he had newly-discovered evidence. People v. Messina, 73 A.D.2d 899, 900 (1st Dept., 1980). This may have been a reasonable trial strategy, but it is not the

basis for a granting of a new trial. People v. Backus, 129 A.D.3d 1621, 1624-1625 (4th Dept., 2015) lv. denied 27 N.Y.3d 991. Thus, the evidence put forth in support of the CPL § 330.30 motion was not newly discovered and was, or could have been, discovered before the case was sent to the jury.

Dr. Jovanovic's report claimed first that the source data had no guarantee of accuracy and in fact was often inaccurate (A 354-355). This argument was made in defendant's motion in limine dated February 6, 2017, by his local expert, Leslie Hyman. It was also a constant theme in Ray's trial testimony on both direct and cross-examination. Jovanovic claimed, for example, that the estimates provided by Verizon, AT&T, Google and Fleetmatics had no accuracy guarantees. Sy Ray, throughout his testimony, gave only estimated locations prefaced with the accuracy or inaccuracy of same. (A 3977-3980, 3984, 3992, 4025, 4028, 4039, 4043, 4045, 4047, 4156, 4157, 4162, 4163-4164, 4171, 4192-4194, 4248-4249, 4296; on cross-examination 4856-4861). As a matter of fact, Sy Ray testified about the accuracy and inaccuracy of the Verizon, AT&T, Google estimations (A 3977, 3979, 3980, 3984, 3992). Jovanovic also asserted that the location estimations were not intended to be used for law enforcement purposes (A 354). Again, in his testimony, Sy Ray agreed and stated that the data gathered by the

cellphone companies was used as a diagnostic tool in the very competitive cellphone industry (A 3978).

Furthermore, in his summation, defense counsel argued in detail about the inaccuracies of the source data (A 4856-4861). This was clearly a matter that was well-covered during trial and one on which defense counsel demonstrated that he was well versed.

Secondly, Dr. Jovanovic questioned Ray's presentation of the data and concluded it was misleading (A 355-356). This claim as well was raised in Leslie Hyman's affidavit in support of the defense motion in limine. (See argument of counsel).

Thirdly, Dr. Jovanovic's affidavit detailed his concerns about the methodology used by Sy Ray in obtaining his drive test data (A 356-358). Ray testified at length about how he had obtained his drive scan data (A 4027-4028, 4098-4102, 4109-4111, 4102). He acknowledged the problems involved in doing a scan at a date considerably after the event (A 4028; he noted concerns with elevation, topography, attenuation, and foliage (A 3647-3657). This too was an area on which defense counsel vigorously cross-examined Ray. (A 3570, 3605-06, 3652-3657). Jovanovic further attacked Ray's claimed assertion that certain evidence was based on search warrants

(A 357). Defense counsel, however had questioned Ray on this topic as well (A 2956-2958). And, counsel addressed these issues in his summation (A 4856, 4860-4862).

Finally, Jovanovic concluded that certain conclusions reached by Ray on the basis of his drive test data were misleading (A 358-359). His claims involved several location estimates made by Ray. These concerns with Ray's testimony were also dealt with in questioning by both counsel and in summations. (cross-examination at A 4205-4917, 4225; defense summation at A 4852-4855).

Throughout the questioning and his summation, counsel evinced a thorough understanding of the material. Moreover, counsel stated that he had been aware of Jovanovic's expertise years earlier (A 1437) and repeatedly mentioned that he and his local expert, Leslie Hyman, had consulted or was going to consult with Jovanovic, and even that he "almost put him on the stand" (A 1927, 4573, 3948, 3950, 4776; motion in limine, affidavit of Leslie Hyman). Counsel argued also that he was "very familiar with" the issues concerning the use of data to determine a phone's location at a particular time because of his awareness of Jovanovic (A 1437). Furthermore, there was in Jovanovic's affidavit no reference to when he did his analysis or how long it

took him. Counsel argues that it took Jovanovic "two months of tedious work" (Defendant's Brief at 120), to reach his conclusions, but Jovanovic's affidavit makes no such claim. Counsel also argues that Jovanovic would not have been prepared to testify at trial (Defendant's Brief at 124), but again, Jovanovic makes no such claim. The materials he lists as those on which he relied were available before and during trial (A 353) The problems he raises were largely dealt with in the direct and cross examination of Ray and addressed in defense counsel's summation. Clearly, the existence of Jovanovic was not newly discovered after trial; nor was the substance of Jovanovic's criticism of Ray's methodology and conclusions.

Appellate counsel argues that the proffered evidence was crucial for his defense, yet significantly, as the trial court noted, no application was made during trial for an adjournment to secure it. Davis, supra. Appellate counsel argues that a continuance request would have been futile, since it would have required adjourning the trial for an extended period of time – he claims it took Jovanovic "two months of tedious work" (Defendant's Brief at 120), to reach his conclusions. See also, Defendant's Brief at 119-124. That assertion is undermined by trial counsel's admission that he had been consulting with Jovanovic throughout the trial, and that he "almost put him on the stand;" by

the omission from Jovanovic's affidavit of any dates when he did his analysis or any claim that he was unable, unwilling or unprepared to testify at trial; by the availability before or during trial of all the materials used by Jovanovic; and by trial counsel's obvious awareness of and competence with all the issues later raised by Jovanovic in his affidavit and report.

After Ray's testimony, the People put on six more witnesses, the defense called ten witnesses, and there were six days until the case was sent to the jury. Defendant has not demonstrated by a preponderance of the evidence that Jovanovic could not have been prepared and called as a witness within that timeframe or with a short continuance. Whether trial counsel decided not to put Jovanovic on as a trial witness for financial reasons or as a shrewd calculation that the expert would be more useful in a post-verdict motion if there was a guilty verdict, it does seem clear that it was his choice. Under these circumstances, the trial court did not abuse its discretion by denying defendant's CPL § 330.30 motion. Having chosen to not use the witness and evidence at trial, he was not entitled to a new trial on the claim that he had now newly discovered that evidence. Messina, supra. This may have been a reasonable trial strategy, but it is not the basis for a granting of a new trial. Backus, supra.

Under Salemi and CPL § 330.30(3) the proffered evidence must also be of such nature as would create a probability (not merely a possibility) that had it been received at the trial the verdict would have been more favorable to defendant. Rivera, supra. Evidence that does not tend to exculpate a defendant is generally insufficient. Wadley, supra. Defendant did not meet his burden of showing that a more favorable verdict was probable. Here, as the trial court determined (A 5344), the evidence was aimed at impeaching the testimony of Sy Ray. All of Jovanovic's affidavit and report focused on attacking Ray's credibility, methodology, and conclusions, rather than asserting new evidence.

Defendant argues that new evidence which impeaches trial evidence may be the basis for granting a new trial where such evidence is critical to the prosecution's case. See Defendant's Brief at 129. His reliance on such cases as People v. Rensing (14 N.Y.2d 210 [1964]; Defendant's Brief at 130-131), is misplaced. Rensing was a death penalty case where, after trial, a key witness for the prosecution was found to be suffering from a long-standing mental illness. The Court of Appeals found that had the jury been made aware of that mental illness, they might have been reluctant to attach credence or

weight to his testimony, thus resulting in a more favorable verdict for defendant. Rensing at 214.

Here, the jury was aware of the problems addressed in Jovanovic's affidavit through direct and cross examination, as well as in the summations of both attorneys. Furthermore, Jovanovic's assertions focused primarily on his view that phone location could not be precise using the data Ray utilized. In this regard, it must be remembered that Ray repeatedly acknowledged the problems with location data and testified that he was making only estimates. Jovanovic would have undoubtedly testified that the imprecision was greater than Ray acknowledged. That is what impeachment evidence does. It would not have directly contradicted evidence of guilt; it would have weakened it. That is merely impeachment and not the kind of evidence present in the cases on which defendant relies. Thus, as in People v. Shilitano, 218 N.Y. 161, 170 (1916) the proffered evidence would not have "destroy[ed] the basis upon which the judgment of conviction rests." See also Defendant's Brief at 129.

In Jovanovic's report, he asserted that the drive scans performed by Sy Ray sixteen months after the calls were made would not allow accurate conclusions about cellphone coverage due to the difference in foliage (A 356). In that regard, Sy Ray testified that the best drive scan would have been done

on the day the phone calls were made (A 4028). Hence, even though it appears Jovanovic and Ray agree on some things, Jovanovic still claimed that, according to his calculations, Ray's conclusions were incorrect. Based upon the foregoing, it is clear that Jovanovic's testimony would only have served to contradict or impeach Ray's testimony for the jury. Such impeachment evidence does not constitute newly discovered evidence. CPL § 330.30.

Accordingly, the trial court was within the scope of its discretion in finding that the proffered evidence was "an attempt to get evidence from Jovanovic to impeach what was presented by Sy Ray." (A 5044). In the context of all the circumstances in this case, it was also within the court's discretion to deny the CPL § 330.30 motion.

The court was also within the bounds of its discretion in reaching its determination without first holding an evidentiary hearing. Whether to conduct a hearing pursuant to CPL § 330.30 is a determination that is within the sound discretion of the trial court. People v. Windsor, 165 A.D.3d 709, 710 (2nd Dept., 2018). Iv. denied 165 A.D.3d 709. Here, defendant's motion, on its face, was legally insufficient. Even though Jovanovic was in Washington, that should not have been a valid reason– Sy Ray "when he left here from testifying went to the state of Washington." (A 5044). Under these

circumstances, the trial court's exercise of its discretion to deny defendant's motion without a hearing was completely appropriate.

Finally, based upon the foregoing, the defendant has failed to show that the impeachment evidence would have resulted in a more favorable verdict to the defendant had it been received at trial. CPL § 330.30; Rivera, supra.

In sum, the trial court properly denied, without a hearing, defendant's motion to set aside the jury verdict. The defendant has ultimately failed to show that Jovanovic's information could not have been produced at trial through the exercise of due diligence. Further defendant has failed to show that had the evidence been admitted, the verdict would have been more favorable to the defendant. Therefore, defendant has not met his burden and his verdict should not be set aside.

CONCLUSION

DEFENDANT'S JUDGMENT OF CONVICTION SHOULD BE AFFIRMED.

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- vs -

THOMAS S. CLAYTON,

Defendant-Appellant.

Rule 1250.8(j) Printing Specification Statement

The attached brief was prepared on a computer using Microsoft Word program with Times New Roman font, 14 point size, double spaced.

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to 22 NYCRR 1250.8 (k), is 34,526 as calculated by the word processing system used to prepare the brief.

By Order of this Court dated January 8, 2019, the People have been granted permission to file a brief not to exceed 35,260 words.